DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-696
Title: Town of Greece, New York, Petitioner
v.
Susan Galloway, et al.
Docketed: December 6, 2012
Linked with 12A366
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (10-3635)
Decision Date: May 17, 2012
Rehearing Denied: August 8, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Oct 15 2012	Application (12A366) to extend the time to file a petition for a writ of certiorari from November 6, 2012 to December 6, 2012, submitted to Justice Ginsburg.
Oct 17 2012	Application (12A366) granted by Justice Ginsburg extending the time to file until December 6, 2012.
Dec 6 2012	Petition for a writ of certiorari filed. (Response due January 7, 2013)
Dec 19 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Dec 21 2012	Order extending time to file response to petition to and including March 8, 2013.
Jan 7 2013	Brief amicus curiae of Rev. Dr. Robert E. Palmer filed.
Jan 7 2013	Brief amici curiae of Andrew M. Tobin, et al. filed.
Jan 7 2013	Brief amici curiae of Members of Congress filed.
Jan 7 2013	Brief amici curiae of Mark L. Baily, et al. filed.
Jan 7 2013	Brief amici curiae of Indiana, et al. filed.
Feb 21 2013	Order further extending time to file response to petition to and including April 8, 2013.
Apr 8 2013	Brief of respondents Susan Galloway, and Linda Stephens in opposition filed.
Apr 23 2013	DISTRIBUTED for Conference of May 9, 2013.
Apr 23 2013	Letter of April 23, 2013, from counsel for respondents received. (Distributed)
Apr 23 2013	Reply of petitioner Town of Greece, New York filed. (Distributed)
May 13 2013	DISTRIBUTED for Conference of May 16, 2013.
May 20 2013	Petition GRANTED.
Jun 5 2013	Consent to the filing of amicus curiae briefs, in support of either party or of

	neither party, received from counsel for the respondents.
Jun 12 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 26, 2013.
Jun 12 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Jul 26 2013	Joint appendix filed. (Statement of costs filed.)
Jul 26 2013	Brief of petitioner Town of Greece, New York filed.
Jul 30 2013	Brief amicus curiae of Brevard County, Florida filed.
Aug 1 2013	Brief amicus curiae of Justice and Freedom Fund filed.
Aug 1 2013	Brief amicus curiae of League of California Cities in support of neither party filed.
Aug 1 2013	Brief amici curiae of Dr. Daniel L. Akin, et al. filed.
Aug 1 2013	Brief amicus curiae of Southern Baptist Convention Ethics & Religious Liberty Commission filed.
Aug 1 2013	Brief amicus curiae of Southeastern Legal Foundation filed.
Aug 1 2013	Brief amicus curiae of Liberty Counsel filed.
Aug 1 2013	Brief amicus curiae of State of South Carolina filed.
Aug 2 2013	Brief amici curiae of United States Senators Marco Rubio, et al. filed.
Aug 2 2013	Brief amicus curiae of American Civil Rights Union filed.
Aug 2 2013	Brief amicus curiae of American Center for Law & Justice filed.
Aug 2 2013	Brief amicus curiae of the United States filed.
Aug 2 2013	Brief amicus curiae of Nathan Lewin filed.
Aug 2 2013	Brief amicus curiae of Chaplain Alliance for Religious Liberty filed.
Aug 2 2013	Brief amici curiae of Virginia Christian Alliance, et al. filed.
Aug 2 2013	Brief amicus curiae of Rev. Dr. Robert E. Palmer filed.
Aug 2 2013	Brief amici curiae of Eighty-five Members of Congress serving in the U.S. House of Representatives filed.
Aug 2 2013	Brief amicus curiae of Center for Constitutional Jurisprudence filed.
Aug 2 2013	Brief amici curiae of Gerard V. Bradley, et al. filed.
Aug 2 2013	Brief amicus curiae of Rutherford Institute filed.
Aug 2 2013	Brief amicus curiae of Foundation for Moral Law filed.
Aug 2 2013	Brief amicus curiae of The Becket Fund for Religious Liberty filed.
Aug 2 2013	Brief amici curiae of Seven Prayer-Givers. filed.
Aug 2 2013	Brief amicus curiae of Wallbuilders, Inc. filed.
Aug 2 2013	Brief amici curiae of Indiana, et al. filed.
Aug 2 2013	Brief amici curiae of Board of Commissioners for Carroll County, Maryland, et al. filed.
Aug 9 2013	The time to file respondents' brief on the merits is extended to and including September 16, 2013.
Aug 19 2013	CIRCULATED.
Aug 20 2013	SET FOR ARGUMENT on Wednesday, November 6, 2013
Sep 12 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 13 2013	Motion for leave to file an amicus curiae brief out of time filed by Faith and Action networks.

Sep 16 2013	Brief of respondents Susan Galloway and Linda Stephens filed. (Distributed)
Sep 20 2013	Brief amici curiae of Law Professors filed. (Distributed)
Sep 23 2013	Brief amici curiae of Erwin Chemerinsky and Alan Brownstein filed. (Distributed)
Sep 23 2013	Brief amici curiae of Baptist Joint Committee for Religious Liberty, et al. filed. (Distributed)
Sep 23 2013	Brief amici curiae of Political Scientists filed. (Distributed)
Sep 23 2013	Brief amicus curiae of Jewish Social Policy Action Network filed. (Distributed)
Sep 23 2013	Brief amici curiae of Unitarian Universalist Association of Congregations, et al. filed. (Distributed)
Sep 23 2013	Brief amici curiae of American Jewish Committee, et al. filed. (Distributed).
Sep 23 2013	Brief amicus curiae of Freedom from Religion Foundation filed. (Distributed)
Sep 23 2013	Brief amici curiae of Center for Inquiry, et al. filed. (Distributed)
Sep 23 2013	Brief amicus curiae of National Conference for Community and Justice filed. (Distributed)
Sep 23 2013	Brief amici curiae of Paul Finkelman, et al. filed. (Distributed)
Sep 23 2013	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Sep 23 2013	Brief amici curiae of Members of Congress Rep. Jerrold Nadler, et al'filed. (Distributed)
Sep 30 2013	Application (13A321) to extend the time to file a reply brief on the merits from October 16, 2013 to October 22, 2013, submitted to Justice Ginsburg.
Oct 1 2013	Application (13A321) granted by Justice Ginsburg extending the time to file the reply brief on the merits until October 22, 2013.
Oct 7 2013	Motion for leave to file an amicus curiae brief out of time by Faith and Action networks. GRANTED.
Oct 15 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 18 2013	Record from U.S.C.A. for 2nd Circuit is electronic.
Oct 18 2013	Record from U.S.D.C. for Western District of New York is electronic.
Oct 21 2013	DVD Exhibits received from U.S.D.C. for Western District of New York. (126 DVDs)
Oct 22 2013	Reply of petitioner Town of Greece, New York filed. (Distributed)
Oct 29 2013	DVD Exihbit received from the U.S.C.A. for the 2nd Circuit. (Joint Appendix Vol. I & II)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
DEC 6 - 2012
OFFICE OF THE CLERK

12 696

No.

IN THE

Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Marsh v. Chambers*, 463 U.S. 783 (1983), this Court upheld the practice of starting legislative sessions with an invocation, based on an "unambiguous and unbroken history" of legislative prayer dating back to the First Congress. *Id.* at 792. The prayers in *Marsh* were offered for sixteen years by the same paid Presbyterian minister and frequently contained explicitly Christian themes. *See id.* at 785, 793 n.14. Nonetheless, this Court held that such prayers are "simply a tolerable acknowledgment of beliefs widely held among the people of this country," and constitutional unless the selection of prayer-givers "stem[s] from an impermissible motive" or "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 792, 793, 794-95. The Court declined to apply the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

In this case, the court of appeals held that the Town of Greece violated the Establishment Clause by allowing volunteer private citizens to open town board meetings with a prayer. Though the Town had never regulated the content of the prayers, had permitted any citizen from any religious tradition to volunteer to be a prayer-giver, and did not discriminate in selecting prayer-givers, the court struck down the Town's prayer practice, applying an "endorsement" test derived from *Lemon*. *See* App. 17a. The question presented is:

Whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, who was defendant-appellee below, is the Town of Greece, New York.

Respondents, who were plaintiffs-appellants below, are Susan Galloway and Linda Stephens.

In addition, John Auberger, the Town of Greece Supervisor, was a defendant in the district court in his official capacity. The claims against Mr. Auberger were dismissed by the district court and Respondents did not appeal that ruling. App. 9a-10a.

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PETITION FOR A WRIT OF CERTIORARI

The Town of Greece, New York, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-27a) is reported at 681 F.3d 20. The order of the court of appeals denying rehearing *en banc* (App. 132a-133a) is unreported. The order of the district court (App. 28a-131a) is reported at 732 F. Supp. 2d 195.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2012. The court of appeals denied the petition for rehearing *en banc* on August 8, 2012. On October 17, 2012, Justice Ginsburg extended the time within which to file a petition for certiorari to and including December 6, 2012. No. 12A366. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech[.]

U.S. Const. amend. I.

STATEMENT

This petition presents the question whether a legislative body can allow private citizens to offer an

invocation of their choosing at the start of each session to solemnize the proceedings, consistent with two centuries of tradition of legislative prayer in the United States and this Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983).

The Town of Greece has a policy whereby any citizen of any faith (or of no faith) may volunteer to give the invocation at the beginning of Town Board meetings, and that policy has resulted in invocations reflective of the faith communities in the Town—including prayers with Christian, Jewish, and Bahá'í references. When two town citizens challenged this practice under the Establishment Clause, the district court concluded—based on *Marsh*—that the practice was permissible. The court of appeals, however, relying on dictum in this Court's decision in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), applied an "endorsement" test and concluded that the proportion of Christian prayers to non-Christian prayers could be viewed by an "ordinary, reasonable observer" as affiliating the Town with the Christian faith. App. 17a, 19a.

The courts of appeals are hopelessly divided over whether legislative-prayer practices should be analyzed under *Marsh*'s historical test or instead under an "endorsement" test derived from *County of Allegheny*. Legislative bodies—from Congress, to state legislatures, to municipal boards—lack sufficient guidance as to which prayer practices are permissible, despite this Court's pronouncement nearly thirty years ago that legislative prayers are generally permissible and, indeed, have become "part of the fabric of our society." *Marsh*, 463 U.S. at 792. Certiorari is warranted to resolve the conflict in authority among the courts of appeals and to clarify that *Marsh*'s

holding, not *Allegheny*'s dictum, provides the proper standard for evaluating legislative prayer.

I. THE TOWN OF GREECE'S LEGISLATIVE PRAYER PRACTICES

Since 1999, the Town of Greece has allowed its citizens to open monthly board meetings with a prayer. App. 29a. To identify potential prayer-givers, the Town telephoned clergy from religious communities in the Town, using a list in the Community Guide, a publication of the Greece Chamber of Commerce. App. 31a. The Town then created a list of clergy who had accepted an invitation to offer a prayer, which the Town periodically updated based on requests from community members and new listings in both the Community Guide and a local newspaper. App. 5a. Town employees would work their way down the list in advance of each meeting until they found someone willing to give the invocation. *Id.*

The Town also allowed any citizen to volunteer to deliver an invocation, and never rejected such a request. App. 4a. Members of many different religious traditions accepted the opportunity to offer a prayer, including Catholics, Protestants from several denominations, a Wiccan priestess, the chairman of a local Bahá'í congregation, and a lay Jewish man. App. 125a. Under the Town's policy, atheists and non-believers were equally welcome to volunteer to give an invocation. *Id.*

The Town has never had any guidelines concerning the appropriate content for a prayer, nor has the Town ever asked to review the wording of any prayers before their delivery. App. 29a-30a. Roughly two thirds of the prayers included uniquely Christian references; others spoke in "generically theistic

terms." App. 7a. Some prayers contained specific references to other faith traditions: the Jewish lay-person referred to "David, your [*i.e.*, God's] servant," the Bahá'í prayer-giver offered the Bahá'í greeting "Alláh-u-Abhá," and the Wiccan priestess referred to Athena and Apollo. *Id.*

Respondents, who periodically attend Town meetings, complained to Town officials starting in September 2007 that the prayers "aligned the [T]own with Christianity" and "were sectarian rather than secular." App. 8a. In response to these concerns, Town officials met with Respondents and explained that any volunteer could deliver the prayers, but the Town would not police prayer content. *Id.*

II. PROCEEDINGS BEFORE THE DISTRICT COURT

Respondents filed suit against the Town in February 2008, alleging two Establishment Clause violations: (1) that the Town's procedure for selecting prayer-givers unconstitutionally "prefer[red] Christianity over other faiths," and (2) that the Town impermissibly permitted individual citizens to deliver "sectarian" prayers. App. 57a-58a.

With respect to the Town's selection process, the district court focused on the Town's motives for its legislative prayer practices, and found no admissible evidence that anyone ever "intentionally excluded [members of] non-Christian faiths from offering prayers." App. 74a. The court also found "no indication that the Town established its unwritten policy of having prayer before meetings for an improper purpose." App. 121a. Accordingly, the court ruled that the Town's selection procedures did not violate the Establishment Clause. App. 78a.

As for Respondents' claim that the prayers were impermissibly "sectarian," the district court observed that "[a]ny analysis of the constitutionality of legislative prayer necessarily begins with" this Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983). App. 79a. The district court noted that this Court affirmed legislative prayer practices in *Marsh* based on the "unique history" of legislative prayer in the United States. *Id.* (internal quotation marks omitted). Legislative prayer, the court explained, was a "unique exception to the *Lemon* test, based primarily if not exclusively on the long history of legislative prayer in Congress, which is often overtly sectarian." App. 127a.[1]

The district court noted that there was dictum in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989), suggesting that the prayers in *Marsh* were acceptable because "the particular chaplain [in that case] had removed all references to Christ." App. 129a (internal quotation marks omitted). The district court concluded, however, that this "statement does not indicate that legislative prayers must be nonsectarian," particularly in light of the fact that the chaplain in *Marsh* was a Presbyterian minister who had delivered prayers in the Judeo-Christian tradition for sixteen years. *Id.* Rather, the court concluded that the *Marsh* test for evaluating the

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[1] Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), a practice which touches upon religion is permissible under the Establishment Clause if it "ha[s] a secular legislative purpose;" "its principal or primary effect . . . neither advances nor inhibits religion;" and it does not "foster an excessive government entanglement with religion." *Id.* at 612-13 (internal quotation marks omitted).

constitutionality of legislative prayer "is not whether the prayer is sectarian or nonsectarian, but whether, based on the totality of the circumstances, the prayer is being exploited to advance or disparage a belief, or to associate the government with a particular religion." App. 129a-130a.

Because the prayers offered by Town members did not "proselytize" or advance or disparage any one creed or belief, the court concluded there was no constitutional infirmity. App. 131a. The court also found that the Town's practice of permitting "a variety of clergy to give invocations" lessened the likelihood "that the government could be viewed as advancing a particular religion, and therefore less[ened] concern over the sectarian nature of particular prayers." App. 129a.

By contrast, the court found that the Respondents' "proposed nonsectarian policy" was "vague and unworkable," since "many of the prayers that [Respondents] say are sectarian are indistinguishable from prayers that they say are not." App. 130a-131a. Even if the Town could differentiate between sectarian and nonsectarian prayers, the court explained that any attempt "to control the content of prayer" would impose "a state-created orthodoxy," which itself would violate the Establishment Clause. App. 130a (citing *Lee v. Weisman*, 505 U.S. 577 (1992)). The court therefore granted summary judgment in favor of the Town on both claims.

III. PROCEEDINGS BEFORE THE COURT OF APPEALS

On appeal, Respondents "expressly abandoned the argument that the [T]own intentionally discriminated against non-Christians in its selection of prayer-givers." App. 10a. Indeed, the court of appeals

acknowledged that the Town had "no religious animus" in implementing its legislative prayer practices. App. 22a. Nevertheless, the Second Circuit reversed the grant of summary judgment because, in that court's view, "the [T]own's prayer practice had the *effect*, even if not the purpose, of establishing religion." App. 10a (emphasis added).

The Second Circuit recognized that *Marsh* "did not employ the three-pronged test the Court had adopted, eleven years earlier, in *Lemon v. Kurtzman*." App. 10a. Nevertheless, based on this Court's observation in *County of Allegheny* that the prayers in *Marsh* did not have "the effect of affiliating the government with any one specific faith or belief," the court of appeals proceeded to apply the "endorsement" test to evaluate the constitutionality of the Town's prayer practices. *See* App. 19a ("We conclude, on the record before us, that the town's prayer practice must be viewed as an endorsement of a particular religious viewpoint."); App. 17a ("We must ask, instead, whether the town's practice, viewed in its totality by an ordinary, reasonable observer, conveyed the view that the town favored or disfavored certain religious beliefs."). This mode of reasoning, with its focus on "endorsement" and the "reasonable observer," mirrors the analysis employed by this Court in *Lemon* and rejected in *Marsh*. *See*, *e.g.*, *Cnty. of Allegheny*, 492 U.S. at 620 (opinion of Blackmun, J.) (applying *Lemon* to consider whether government action signaled "endorsement . . . of individual religious choices . . . according to the standard of a 'reasonable observer'" (internal quotation marks omitted)).

In applying its "endorsement" test, the Second Circuit closely scrutinized the content of the prayers

offered. The court conceded that "[t]he prayers in the record were not offensive in the way identified as problematic in *Marsh*: they did not preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like." App. 21a. Nevertheless, the court placed substantial weight on the fact that most of the prayers at issue "contained uniquely Christian references." App. 20a. The court reasoned that the fact that "individuals from other faiths delivered the invocation cannot overcome the impression, created by the steady drumbeat of often specifically sectarian Christian prayers, that the town's prayer practice associated the town with the Christian religion." App. 22a.

The court concluded its analysis by noting that the constitutional "difficulties" it identified with the Town's policies "may well prompt municipalities to pause and think carefully before adopting legislative prayer." App. 27a. Petitioner sought rehearing *en banc*, which was denied. App. 132a-133a.

REASONS FOR GRANTING THE PETITION

In *Marsh v. Chambers*, this Court held, based on over 200 years of tradition and history, that "the practice of opening legislative sessions with prayer has become part of the fabric of our society," and that "[t]o invoke Divine guidance on a public body entrusted with making the laws is not . . . an 'establishment' of religion or a step toward establishment." 463 U.S. 783, 792 (1983). "Weighed against th[is] historical background," this Court upheld the legislative prayers at issue in *Marsh* even though "a clergyman of only one denomination—Presbyterian—ha[d] been selected for 16 years," was "paid at public expense," and selected prayers that were "often explicitly Christian." *Id.* at 793 & n.14. *Marsh* created

a clear test for future courts to follow: legislative prayers are constitutional, so long as the government does not act with improper motive in selecting prayer-givers or exploit the prayer opportunity to proselytize, advance, or disparage any one faith or belief. *Id.* at 793-95.

The Second Circuit applied a different, and incorrect, rule of law based on dictum in this Court's decision in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). That case concerned the constitutionality of a crèche display on government property, but the Court distinguished *Marsh* in passing, noting that the chaplain in *Marsh* had "removed all references to Christ" in his prayers (albeit fifteen years into his service). *Id.* at 603 (internal quotation marks omitted). The court below misinterpreted this dictum to mean that *County of Allegheny* had modified *Marsh* such that *Marsh*'s holding that legislative prayer is constitutional absent improper government motive or exploitation of the prayer opportunity no longer applied; in the Second Circuit's view, frequent "sectarian" references in legislative prayers offered predominantly by Christian prayer-givers could render unconstitutional a legislative prayer practice—regardless of the government's intent—because such references "have the *effect* of affiliating the government with [a] specific faith or belief." *Id.* (emphasis added); *see* App. 15a-17a.

The decision below conflicts with this Court's decision in *Marsh*, and deepens an already-existing circuit conflict over whether *Marsh* or *Lemon* (as modified by *County of Allegheny*) supplies the correct standard for evaluating legislative prayer. Like the Second Circuit in this case, the Fourth Circuit has

also relied on *County of Allegheny*'s dictum to strike down legislative prayer unless it is "nonsectarian in both policy and practice" and does not result in an "effective endorsement of one faith." *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 348, 355 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012). Indeed, in *Joyner* the Fourth Circuit went even further, requiring deliberative bodies to be "proactive in discouraging sectarian prayer in public settings." *Id.* at 353. By contrast, the Eleventh Circuit has adhered to the *Marsh* test, holding that "courts are not to evaluate the content of [legislative] prayers absent evidence of exploitation" and refusing to read *County of Allegheny* "narrowly to permit only nonsectarian prayer." *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1271 (11th Cir. 2008).

Thus, the courts of appeals are divided over the perceived tension between the test set forth in *Marsh* and the dictum in *County of Allegheny*. This Court's intervention is necessary to resolve this conflict and to clarify the proper legal standard for evaluating legislative prayer.

I. THE COURTS OF APPEALS ARE DIVIDED OVER THE PROPER STANDARD FOR EVALUATING LEGISLATIVE PRAYER UNDER THE ESTABLISHMENT CLAUSE

The courts of appeals are divided over the question whether to analyze the constitutionality of legislative prayer using the test set forth by this Court in *Marsh* (which focuses solely on whether the government had an impermissible motive in the selection of speakers or an impermissible intent to proselytize or to advance or disparage a particular faith or creed) or instead to apply the "endorsement" test derived from *Lemon*, *County of Allegheny*, and other cases

(which focuses principally on the assumed effect that a prayer practice may have on a "reasonable" observer).

At one end of the spectrum, the Eleventh Circuit has faithfully applied the standard announced by this Court in *Marsh*. In *Pelphrey* the court of appeals recognized that *Marsh* only "prohibited the selection of invocational speakers based on an 'impermissible motive' to prefer certain beliefs over others." 547 F.3d at 1278. With respect to the prayers themselves, the court found "no clear consensus among [its] sister circuits about sectarian references in legislative prayer," but "read *Marsh* . . . to forbid judicial scrutiny of the content of prayers absent evidence that the legislative prayers have been exploited to advance or disparage a religion." *Id.* at 1274. Despite the fact that: (1) the prayers at issue in *Pelphrey* contained references to "'Jesus, 'Allah,' 'God of Abraham, Isaac, and Jacob,' 'Mohammed,' and 'Heavenly Father,'" and (2) upwards of sixty-eight percent of the prayers contained explicitly Christian references, the court refused to "embark on a sensitive evaluation or to parse the content of a particular prayer" absent evidence of exploitation, and shunned the role of "ecclesiastical arbiter." *Id.* at 1266-67, 1274 (internal quotation marks omitted). Thus, the Eleventh Circuit affirmed the district court's holding that Cobb County's prayer practices were permissible, except during two years in which the county had categorically and intentionally excluded speakers from particular faiths. *Id.* at 1282.

On the other end of the spectrum, the Fourth Circuit in *Joyner* "hewed to th[e] approach" purportedly set forth in *County of Allegheny*, which the *Joyner* court understood to require an evaluation of

whether the prayers had the *effect* of aligning the government with a particular religion in the eyes of a reasonable observer. 653 F.3d at 348. Even though the legislative prayer policy at issue there was neutral and inclusive, and thus free of discriminatory intent, the court concluded that citizens at board meetings "hear the prayers, not the policy." *Id.* at 354. Thus, the court focused on what it perceived as "the practical effects of the invocations at issue." *Id.* In the Fourth Circuit's view, legislative prayer is permissible only if it "strive[s] to be nondenominational" and is "nonsectarian in both policy and practice." *Id.* at 348-49. As a consequence, the Fourth Circuit's test would require a court to play the role of censor, policing the content of legislative prayer.

Finally, the Second Circuit in the decision below explicitly imported the "endorsement" test from *County of Allegheny* into the legislative prayer context, holding that the dispositive inquiry is not the *Marsh* test, but rather whether the town's practice, when viewed in context by an "ordinary, reasonable observer," "can be seen as endorsing a particular faith or creed over others." App. 17a, 25a. Unlike the Fourth Circuit in *Joyner*, the Second Circuit did not hold that a "reasonable observer" would take offense at sectarian prayers. App. 17a, 21a. But the Second Circuit nonetheless concluded that "[t]he [T]own had an obligation to consider how its prayer practice would be perceived by those who attended town board meetings," regardless of whether the Town's motive was exploitative or otherwise impermissible under *Marsh*. App. 22a.

The circuits are thus deeply divided on both the proper test to apply when evaluating legislative prayer practices (the "exploitation"/"impermissible

motive" test from *Marsh* or the "endorsement" test from *County of Allegheny*) as well as the extent to which this Court's precedents permit references to particular religious traditions in legislative prayer.[2]

These differing legal standards have created an incoherent legal environment in which similar prayer practices have been upheld or struck down depending on the jurisdiction in which a challenge is raised. Indeed, the prayers at issue in *Pelphrey*, *Joyner*, and *Galloway* all shared the following material characteristics:

- The deliberative bodies neutrally extended invitations to the leaders of religious congregations within the jurisdiction; App. 4a-6a; *Joyner*, 653 F.3d at 343; *Pelphrey*, 547 F.3d at 1267;

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[2] On the latter issue, the court below (unlike the Fourth Circuit in *Joyner*) correctly conceded that "sectarian" references do not "inherently" violate the Establishment Clause. App. 21a. But the Second Circuit nevertheless concluded that, "in light of *Allegheny*," it could "consider, more broadly, the substance of the prayers under challenge" in applying the "endorsement" test. App. 21a n.6. Ultimately, the court held that the Town's "steady drumbeat of often specifically sectarian Christian prayers" amounted to an impermissible endorsement. App. 22a. This case thus provides the Court with an opportunity to resolve a conflict among the courts of appeals over whether the Establishment Clause precludes legislative invocations that reference particular religious traditions. *Compare* App. 21a, *and Pelphrey*, 547 F.3d at 1271 ("To read *Marsh* as allowing only nonsectarian prayers is at odds with the clear directive by the Court."), *with Joyner*, 353 F.3d at 351-52 (asserting that *Allegheny* and *Marsh* preclude sectarian prayer), *and Hinrichs v. Bosma*, 440 F.3d 393, 399 (7th Cir. 2006) ("The Supreme Court itself has read *Marsh* as precluding sectarian prayer."), *vacated on other grounds*, 506 F.3d 584 (7th Cir. 2007).

- Private citizens voluntarily delivered the invocations; App. 4a; *Joyner*, 653 F.3d at 343; *Pelphrey*, 547 F.3d at 1267;

- The invocation's content was dictated by the speaker's conscience, without prior review by the deliberative body; App. 4a; *Joyner*, 653 F.3d at 343; *Pelphrey*, 547 F.3d at 1267;

- Clergy identified with the Christian faith delivered a significant number of the invocations because of the community's demographics; App. 4a; *Joyner*, 653 F.3d at 356 (Niemeyer, J., dissenting); *Pelphrey*, 547 F.3d at 1267;

- A majority of the invocations contained explicitly Christian references; App. 7a; *Joyner*, 653 F.3d at 343; *Pelphrey*, 547 F.3d at 1267; and

- Invocations were offered by a variety of faith traditions, both Christian and non-Christian; App. 4a-5a; *Joyner*, 653 F.3d at 356 (Niemeyer, J., dissenting); *Pelphrey*, 547 F.3d at 1267.

The Eleventh Circuit determined that such practices are consistent with this Court's decision in *Marsh*. Yet the Second and Fourth Circuits declined to apply the unvarnished *Marsh* test, adopting instead a *Lemon*-style endorsement test that asks "whether the [prayer] practice, viewed in its totality by an ordinary, reasonable observer, conveyed the view that the [government] favored or disfavored certain religious beliefs." App. 17a; *see also Joyner*, 653 F.3d at 348.

Review is therefore warranted to ensure consistency across the Nation and to provide uniform guidance to the federal, state, and local governments regarding the constitutionality of legislative prayer practices.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *MARSH* AND OTHER CASES

The Second Circuit held that legislative prayer practices can be unconstitutional, even absent any evidence of "religious animus," simply because the prayers (and prayer-givers) disproportionately use explicitly Christian references. App. 22a. That holding conflicts squarely with this Court's holding in *Marsh* that legislative prayers are constitutional unless there is evidence of "impermissible motive" or "exploit[ation]" of the prayer opportunity. *Marsh*, 463 U.S. at 793-95. Whereas *Marsh* rejected application of the *Lemon* test in legislative prayer cases, the court below applied an "endorsement" test derived directly from *Lemon* and its progeny. *See, e.g.*, *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 282 (3d Cir. 2011) ("The endorsement test and the second *Lemon* prong are essentially the same."), *cert denied*, 132 S. Ct 1097 (2012). This Court should grant certiorari to resolve the conflict and reaffirm that *Marsh* provides the proper standard by which to evaluate legislative prayer.

A. *Marsh* Establishes That Legislative Prayers Are Constitutional Absent Evidence Of Impermissible Intent Or Exploitation Of The Prayer Opportunity

This Court has given plenary consideration to the constitutionality of legislative prayer practices only once. In *Marsh*, this Court upheld the State of Nebraska's practice of opening each legislative session with an invocation—a practice the Court described as "deeply embedded in the history and tradition of this country." 463 U.S. at 786. "From colonial times through the founding of the Republic and ever

since," this Court explained, "the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Id.* Moreover, the First Congress vigorously debated whether or not to institute legislative prayer before deciding in the affirmative, which the Court explained "demonstrat[es] that the subject was considered carefully and the action not taken thoughtlessly." *Id.* at 791. Members of that Congress even considered the problem presented by clergy delivering prayers with which some listeners were bound to disagree; Samuel Adams replied to this objection that "'he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country.'" *Id.* at 792 (quoting Charles Francis Adams, *Familiar Letters of John Adams and his Wife, Abigail Adams, During the Revolution* 37-38 (1875)).

Thus, this Court established simple rules to govern legislative-prayer cases that would, in most instances, result in upholding the practice of legislative prayer. First, selection of a prayer-giver from a single denomination over an extended period of time is constitutional absent proof of impermissible motive. *See* 463 U.S. at 793-94. Second, the content of prayers is "not of concern to judges where . . . there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-95.[3] The Court thus eschewed the multifactor *Lemon* test in favor of relatively bright-line rules. *See id.* at 786; *see also Van Orden v. Perry*, 545 U.S. 677, 686 (2005)

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[3] The Court also held that paying a chaplain at public expense does not violate the Establishment Clause. 463 U.S. at 794.

(Rehnquist, C.J., plurality opinion) (noting that *Marsh* did not apply *Lemon*).

Applying its announced standard, the *Marsh* Court rejected the notion that a Presbyterian minister's reappointment over many years "has the effect of giving preference to his religious views." 463 U.S. at 793. It also refused to make any inquiry into the content of the minister's prayers, despite the fact that for nearly all of his tenure the prayers contained explicitly Christian themes. *Id.* at 793 n.14; *see also Van Orden*, 545 U.S. at 688 n.8 (Rehnquist, C.J., plurality opinion) (noting that "[i]n *Marsh*, the prayers were often explicitly Christian" and references to Christ were not limited until the year after suit was filed). The Court concluded that "it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." 463 U.S. at 795.

The Court addressed the related topic of government-sponsored prayers outside of the legislative prayer context in *Lee v. Weisman*, 505 U.S. 577 (1992). In *Lee*, the Court held that the Establishment Clause prohibits school officials from superintending the content of school prayers to ensure that they are inclusive and nondenominational. *Id.* at 590. The Court explained that the government may not "establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds," and that a state-imposed requirement that all prayers be nondenominational is akin to the establishment of "an official or civic religion." *Id.*

The legal standards applied by the court of appeals below cannot be reconciled with this Court's decisions in *Marsh* and *Lee*, or with the plurality's reasoning in *Van Orden*. Under *Marsh*, the touch-

stone for whether legislative prayer is constitutional is whether the government acts with impermissible motive; in the case at bar, however, the court of appeals conceded that the Town harbored no discriminatory motive, App. 21a, but invalidated its prayer practice anyway. In *Marsh* and *Lee*, the Court discouraged inquiries into the content of government-sponsored prayers; in the case at bar, by contrast, the content of the prayers offered at the Town's board meetings was central to the Second Circuit's holding that the Town had violated the Constitution. *See* App. 23a. *Marsh* makes clear that legislative prayer is a special context in which historical precedent provides the answer and the *Lemon* test does not apply; the court below, however, rejected that teaching and instead applied an "endorsement" test derived from *Lemon*.

The Second Circuit acknowledged that "[t]he prayers in the record were not offensive in the way identified as problematic in *Marsh*," but it did not end the inquiry there. App. 21a. Rather, the court concluded that the Town had advanced a particular faith (Christianity) because the prayers given were not "substantially neutral amongst creeds." App. 20a. In making that determination, the court of appeals painstakingly parsed prayer language, criticizing for example the fact that some citizen prayer-givers "spoke in the first-person plural: let 'us' pray, 'our' savior, 'we' ask, and so on." App. 23a. This inquiry into the content of prayers is prohibited by *Marsh* and *Lee*.

In short, review is warranted because the Second Circuit's adoption of a *Lemon*-style endorsement test conflicts directly with this Court's precedents. The court below declined to follow this Court's guidance

in *Marsh* and established its own constitutional standard which, as it candidly admits, will cause municipalities to "think carefully before adopting legislative prayer." App. 27a. That standard turns the presumption of constitutionality established by this Court in *Marsh*, which was steeped in over 200 years of history, on its head. For this reason as well, the Court should grant review to reaffirm the *Marsh* standard and resolve the conflict between its precedents and the decision below.

B. This Court's Review Is Necessary To Resolve The Perceived Conflict Between *Marsh* And *Allegheny*

In adopting the "endorsement" test, the Second Circuit relied heavily on dictum in this Court's opinion in *County of Allegheny*. But that opinion cannot bear the weight that the Second Circuit has placed on it. Certiorari is warranted to address the perceived conflict between *Marsh*'s rule and *Allegheny*'s dictum, which has created confusion in the courts of appeals.

In *County of Allegheny*, this Court concluded that the display of a crèche on the staircase of a court building violated the Establishment Clause because it had the "effect of promoting or endorsing religious beliefs." 492 U.S. at 621 (opinion of Blackmun, J.). Justice Kennedy, joined by three other Justices, dissented in part, urging the Court to apply *Marsh*'s historical approach to the crèche display rather than the endorsement test. *Id.* at 669-70 (Kennedy, J., concurring in the judgment in part and dissenting in part). In response, Justice Blackmun, writing for the majority, cabined *Marsh*'s holding to the unique historical practice of legislative prayer. *See id.* at 603 (majority opinion). In dictum, Justice Blackmun

added that even after *Marsh*, not all legislative prayer practices would necessarily pass constitutional muster. According to Justice Blackmun, even *Marsh* could not justify prayers that "demonstrate the government's allegiance to a particular sect or creed," or that have the "effect of affiliating the government with any one specific faith or belief." *Id.* He added that the Court had not confronted such questions in *Marsh* because the chaplain in that case had eliminated any possibility of a constitutional violation by "remov[ing] all references to Christ." *Id.* (internal quotation marks omitted).

County of Allegheny did not, however, modify the *Marsh* test or announce a standard for assessing whether, or to what extent, sectarian references must be expunged from legislative prayer. Nor could it have done so, because the constitutionality of legislative prayer was not at issue in *Allegheny*. Whatever the intent of Justice Blackmun's dictum, any suggestion that *Marsh* turned on the supposed absence of faith-specific references is contrary to the record and reasoning in that case. The Presbyterian chaplain in *Marsh* often offered prayers that were explicitly Christian, and did so over the course of fifteen years. 463 U.S. at 793 n.14. The dissenters even cited these sectarian references as a basis for their disagreement with the majority decision. *Id.* at 800 nn.9-10 (Brennan, J., dissenting); *id.* at 823 & n.2 (Stevens, J., dissenting). While the Court noted in passing that the chaplain voluntarily removed references to Christ in 1980, all of the prayers in the record were offered in 1979 or earlier. *See id.* at 793 n.14 (majority opinion); *see also Van Orden*, 545 U.S. at 688 n.8 (Rehnquist, C.J., plurality opinion) (noting that "[i]n *Marsh*, the prayers were often explicitly Christian" and references to Christ were not limited

until the year after suit was filed). Yet the *Marsh* Court declined to review the content of those prayers, because the absence of government exploitation sufficed to render the practice constitutional. Thus, the passing dictum in *County of Allegheny* does nothing to undermine *Marsh*'s holding that the faith-specific prayers in the record in that case passed constitutional muster.

Nevertheless, multiple courts of appeals have erroneously relied on *County of Allegheny*'s dictum to justify use of the endorsement test when evaluating legislative prayer. *See, e.g.*, App. 15a ("It is also clear, under *Allegheny*, that legislative prayers may not have the effect of affiliating the government with any one specific faith or belief.") (internal quotation marks omitted); *Joyner*, 653 F.3d at 349 (holding that *Allegheny* and *Marsh* should be read together to preclude sectarian prayer); *see also Hinrichs*, 440 F.3d at 399 ("The Supreme Court itself has read *Marsh* as precluding sectarian prayer."). This confusion has led to inconsistent, conflicting results across the country in challenges to substantially similar prayer practices. Thus, this Court should grant review to provide the lower courts with guidance regarding the continued vitality of the explicit holding in *Marsh*.

C. *Marsh* Provides A Rational Framework For Protecting Traditional Legislative Prayer And The Prayer-Giver's Conscience Rights

Marsh provides a workable framework for evaluating legislative prayers that is consistent with the purposes underlying the Establishment Clause. That clause protects the rights of conscience by prohibiting government censorship or the parsing of

prayers. *See Lee*, 505 U.S. at 592 ("A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."). Because of the risks inherent in allowing the state to police theological matters, this Court has emphasized that the government may take no action for the *purpose* of establishing religion. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). Indeed, the First Amendment would not even permit the government to mandate a prayer that promotes a transcendent ethic or morality divorced from any particular creed. *Lee*, 505 U.S. at 589; *see also Engel v. Vitale*, 370 U.S. 421, 430 (1962) (noting that the government "is without power to prescribe by law any particular form of prayer" even when part of a government-sponsored activity). These matters, rather, are left to the particular prayer-giver's conscience, consistent with the rights to freedom of speech and religious expression.

Recognizing the potential danger to conscience rights posed by government oversight of worship practices, this Court has repeatedly cautioned against government control of prayer content. *See, e.g., Lee*, 505 U.S. at 588; *Engel*, 370 U.S. at 425. The adoption of an endorsement test effectively nullifies this line of precedent. An endorsement test requires courts to parse prayers' content and thus inevitably forces courts to play the role of theologian, making judgments about the prayers' validity based on the supposed religious effect they are likely to have on observers. Courts applying this test have tended to strike down the prayer practice in question, after carefully parsing the judicially perceived theological content of the prayers. *See* App. 24a; *Joyner*, 653 F.3d at 349 (focusing on the number of references to Jesus and Christian tenets). This ap-

proach unduly constricts, and effectively rewrites, the *Marsh* presumption that such prayers are constitutional, regardless of their content.

The *Marsh* test allows courts to guard against *governmental* promotion of a particular faith tradition, while respecting the right of any prayer-giver to offer an invocation in that individual's religious tradition by refusing to police the content of prayers. This Court should grant certiorari to clarify that, notwithstanding the *County of Allegheny* dictum, the *Marsh* test remains the governing standard for analysis of legislative prayer.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S LIMITED PUBLIC FORUM JURISPRUDENCE

The test articulated in *Marsh* provides sufficient guidance to lower courts to resolve this case in its entirety. But this case also presents the Court with an opportunity to make clear that legislative prayers receive additional constitutional protection when offered by private citizens—as opposed to paid chaplains—in a limited public forum. The Second Circuit did not address this issue, and instead engaged in a content-based analysis of the legislative prayers without regard to the free-speech rights of the prayer-givers, implicitly assuming that the prayers of private citizens could be attributed to the state. Thus, not only did the Second Circuit adopt an endorsement test that is inconsistent with *Marsh*, it also created a test that burdens private prayer-givers' free-speech rights. Simply put, the Second Circuit's approach overlooks the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech

and Free Exercise Clauses protect." *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990).

This Court has repeatedly recognized that "a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009) (citing *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 46, n.7 (1983)); *see Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (forum limited to student groups); *see also City of Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 174-76 (1976) (forum limited to discussing school business). That is the case here: the Town opened a forum for legislative prayers at Town Board meetings in which any private citizen could participate; the prayers offered in that forum were therefore a form of constitutionally protected speech.

The Town did not run afoul of the Establishment Clause by establishing a limited public forum for legislative prayer. As this Court has explained, "'[A] significant factor in upholding governmental programs in the face of an Establishment Clause attack is their *neutrality* towards religion.'" *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995)). Unlike the government-paid chaplain in *Marsh* (whose prayers were constitutional despite his status as a state employee), the prayers at issue here were offered by volunteers or individuals invited pursuant to a neutral policy. This Court's precedents recognize that the First Amendment protects the content of speech offered by private citizens in a limited, and neutral,

public forum. The Second Circuit's opinion overrode those protections in invalidating the Town's prayer practices as prohibited by the Establishment Clause.

These free-speech protections are critically important. Most recent legislative-prayer litigation involves deliberative bodies at the municipal or county level. None of the cases has involved the services of a paid chaplain. As in this case, many involve prayers delivered by volunteer citizens.[4] Application of this Court's limited public forum jurisprudence to uphold the Town's legislative prayer practice would provide additional clarity and much-needed guidance for state and local governments and lower courts attempting to distinguish between government and private speech in the context of legislative prayer.

IV. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT, AND REVIEW IS WARRANTED TO HARMONIZE THE FIRST AMENDMENT STANDARDS APPLICABLE TO LEGISLATIVE PRAYER

This Court's historical analysis in *Marsh* affirms the role of public prayer from the very founding of this Nation. Deliberative bodies at every level of government have adopted legislative prayer practices. This widespread practice highlights the compel-

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[4] *See* App. 4a; *Pelphrey*, 547 F.3d 1263, 1266; *Hinrichs*, 506 F.3d 584, 586; *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 379 (4th Cir. 2005); *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998) (en banc); *Rubin v. City of Lancaster*, 802 F. Supp. 2d 1107, 1115 (C.D. Cal. 2011) (appeal pending); *Atheists of Fla., Inc. v. City of Lakeland*, 838 F. Supp. 2d 1293, 1312-13 (M.D. Fla. 2012) (appeal pending); *Jones v. Hamilton Cnty.*, --- F. Supp. 2d ----, 2012 WL 3763963, at *1-2 (E.D. Tenn. 2012) (appeal pending); *Doe v. Tangipahoa Parish Sch. Bd.*, 631 F. Supp. 2d 823, 826-27 (E.D. La. 2009).

ling need for this Court to articulate clear, constitutional standards under which deliberative bodies at all levels of government may appropriately engage in this historical practice without constant threats of costly litigation and arbitrary and unpredictable decisionmaking in the lower courts.

For more than two decades after the *Marsh* Court recognized and affirmed the historical and ubiquitous American tradition of legislative prayers, the constitutional status of legislative prayer practices was largely undisputed. The issue produced only three lower court decisions, just two of which were published.[5] But in 2004, that changed dramatically with the Fourth Circuit's holding that legislative prayer practices must be analyzed in light of *County of Allegheny's* gloss on the *Marsh* standard. *See Wynne v. Town of Great Falls*, 376 F.3d 292, 297-98 (4th Cir. 2004) (determining that *Allegheny* "offered further guidance on the proper scope" of *Marsh*). Since the *Wynne* decision in 2004, numerous federal constitutional challenges have been raised to legislative-prayer practices, and the number continues to rise.[6]

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[5] *See Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999); *Bacus v. Palo Verde Sch. Dist. Bd. of Ed.*, 52 F. App'x 355 (9th 2002) (memorandum); *Snyder*, 159 F.3d 1227.

[6] At present, cases presenting this issue are pending in five circuits, in addition to this Second Circuit case. *See Jones*, 2012 WL 3763963 (appeal of denial of preliminary injunction pending before the Sixth Circuit); *Doe v. Pittsylvania Cnty.*, 842 F. Supp. 2d. 906 (W.D. Va. 2012) (awaiting a ruling regarding the entry of a permanent injunction); *Atheists of Fla.*, 838 F. Supp. 2d 1293 (oral argument before Eleventh Circuit heard on December 6, 2012); *Rubin*, 802 F. Supp. 2d 1107 (oral argument before Ninth Circuit heard on November 8, 2012); *Doe v. Franklin*

The *Wynne* court's injection of the endorsement test into the evaluation of legislative prayer practices has sparked nationwide litigation generating divided panel opinions and an irreconcilable three-way circuit conflict culminating in the Second Circuit's conclusion here that municipalities must "pause and think carefully" before adopting legislative prayers. App. 27a. Indeed, at least one State has already abandoned this important historical practice to avoid costly litigation in light of the jurisprudential uncertainty created by the conflicting lower-court precedents. *See* Kerry Picket, *Hawaii Senate Becomes First Legislative Body To End Daily Prayer*, Wash. Times Water Cooler Blog (Jan. 21, 2011, 4:44 PM), http://www.washingtontimes.com/blog/watercooler/2011/jan/21/hawaii-senate-becomes-first-legislative-body-end-d/. Since 2008, this Court has been presented with three prior petitions for certiorari directly seeking guidance on the confusion surrounding the application of *Marsh* to legislative prayer practices.[7] The question presented continues to arise with increasing frequency, and the circuit conflict has only deepened since the last such petition was considered. As the lower courts continue to wrestle with the proper test to apply in legislative prayer cases, the disagreements and conflicts simply widen, sowing ever-greater confusion and disharmony. The time has come for this Court to speak directly to this re-

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[Footnote continued from previous page]

Cnty., No. 4:12-cv-00918-SNLJ (E.D. Mo.) (discovery ongoing in anticipation of summary judgment motions in January 2013).

[7] *Indian River Sch. Dist.*, 132 S. Ct. 1097 (2012) (cert. denied); *Joyner*, 132 S. Ct. 1097 (cert. denied); *Turner v. City Council*, 555 U.S. 1099 (2009) (cert. denied).

curring and important question that has divided the lower courts, before still more governmental bodies are subjected to costly litigation applying inconsistent constitutional standards to a solemn and profound practice that has commenced meetings of this Nation's legislative bodies from before the Founding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 2012

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2011

(Argued: September 12, 2011 Decided: May 17, 2012)

Docket No. 10-3635-cv

SUSAN GALLOWAY and LINDA STEPHENS,

Plaintiffs–Appellants,

- v. -

TOWN OF GREECE,

Defendant–Appellee,

-and-

JOHN AUBERGER,
in his official capacity as Town of Greece Supervisor,

Defendant.*

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* The Clerk of Court is directed to amend the official caption as shown above.

Before: CALABRESI, WESLEY, and LYNCH, *Circuit Judges*.

Susan Galloway and Linda Stephens appeal from a grant of summary judgment dismissing their challenge to the legislative prayer practice at Town Board meetings in the Town of Greece, New York. We hold that the district court erred in rejecting plaintiffs' argument that the town's prayer practice affiliated the town with a single creed, Christianity, in violation of the Establishment Clause. Accordingly, we REVERSE and REMAND for further proceedings consistent with this opinion.

* * *

CALABRESI, *Circuit Judge*:

Since 1999, the Town of Greece, New York, has begun its Town Board meetings with a short prayer. In 2008, town residents Susan Galloway and Linda Stephens brought suit against the town and Town Supervisor John Auberger in the United States District Court for the Western District of New York, asserting that aspects of this prayer practice violated the Establishment Clause. The district court (Charles J. Siragusa, *J.*) granted the defendants' motion for summary judgment, and the plaintiffs appeal. We hold that, on this record, the district court erred in rejecting the plaintiffs' argument that the prayer practice impermissibly affiliated the town with a single creed, Christianity. Accordingly, we REVERSE and REMAND for further proceedings consistent with this opinion.

I. BACKGROUND

For the most part, the facts at issue are not disputed. The parties dispute how to characterize the facts, but they agree, in nearly every regard, as to the facts themselves.

The Town of Greece is a municipal corporation located in Monroe County, New York, just outside the city of Rochester. As of the 2000 census, the town had roughly 94,000 residents. An elected, five-member Town Board governs the town and conducts official business at monthly public meetings. At these meetings, the Board votes on proposed ordinances, conducts public hearings, bestows citizenship awards, swears in new town employees, and the like. Residents and town employees attend Town Board meetings to monitor and participate in these aspects of town governance. At times, children are among the residents attending town meetings; members of Boy Scout troops and other student groups have led the Pledge of Allegiance, and high school students may fulfill a state-mandated civics requirement necessary for graduation by going to Board meetings.

Before 1999, Town Board meetings began with a moment of silence. That year, at Auberger's direction, the town began inviting local clergy to offer an opening prayer. Typically, Auberger has called each meeting to order, the Town Clerk has called the roll of Board members, and Auberger has then asked the audience to rise for the Pledge of Allegiance. After the audience has been seated following the Pledge, Auberger has introduced the month's prayer-giver, who has delivered the prayer over the Board's public address system. Prayer-givers have often asked members of the audience to participate by bowing their heads, standing, or joining in the prayer. After

the prayer's conclusion, Auberger has typically thanked prayer-givers for being the town's "chaplain of the month," at times also presenting them with a plaque. The town has consistently listed the prayer in each meeting's official minutes.

Between 1999 and June 2010, when the record in this litigation closed, the town did not adopt any formal policy regarding (a) the process for inviting prayer-givers, (b) the permissible content of prayers, or (c) any other aspect of its prayer practice. The town claims that anyone may request to give an invocation, including adherents of any religion, atheists, and the nonreligious, and that it has never rejected such a request. The town also asserts that it does not review the language of prayers before they are delivered, and that it would not censor an invocation, no matter how unusual or offensive its content. When Galloway and Stephens complained about the town's prayer practice in 2007, the town explained the above-mentioned practices. The town acknowledges, however, that it has not publicized to town residents that anyone may volunteer to deliver prayers or that any type of invocation would be permissible.

In practice, Christian clergy members have delivered nearly all of the prayers relevant to this litigation, and have done so at the town's invitation. From 1999 through 2007, every prayer-giver who gave the invocation met this description. In 2008, after Galloway and Stephens had begun complaining to the town about its prayer practice, non-Christians delivered the prayer at four of the twelve Town Board meetings. A Wiccan priestess and the chairman of the local Baha'i congregation each delivered one of these prayers, and a lay Jewish man delivered

the remaining two. The town invited the Wiccan priestess and the lay Jewish man after they inquired about delivering prayers; it appears that the town invited the Baha'i chairman without receiving such an inquiry. However, between January 2009 and June 2010, when the record closed, all the prayer-givers were once again invited Christian clergy.

Although the town did not adopt, prior to June 2010, a formal policy concerning the selection of prayer-givers, it developed a more or less standard procedure. Three successive employees at the town's Office of Constituent Services had responsibility for inviting clergy to deliver prayers. The employee first charged with this task initially solicited clergy by telephoning, at various times, all the religious organizations listed in the town's Community Guide, a publication of the Greece Chamber of Commerce. Thereafter, this employee, Linda Sofia, compiled a "Town Board Chaplain" list containing the names of individuals who had accepted invitations to give prayers. Sofia and the two employees who succeeded her in this role testified that they worked their way down the list, calling clergy about a week before each Town Board meeting until they found someone willing to give the prayer. They also testified that they updated the list periodically based on requests from community members and on new listings in the Community Guide and a local newspaper, the *Greece Post*.

Until 2008, the "Town Board Chaplain" list contained only Christian organizations and clergy. Religious congregations in the town are primarily Christian. Galloway and Stephens have both lived in or near Greece for more than thirty years, and both testified that they were unaware of any non-

Christian places of worship in the town. In the district court, the plaintiffs introduced a map indicating the presence of a Buddhist temple in the town as well as several Jewish synagogues located just outside the town. There is no indication, however, that these organizations were listed in the Community Guide or the *Greece Post*. The map illustrated, moreover, that almost all of the organizations on the town's prayer list, unlike the synagogues, were located within the town limits. In 2008, the town added to the list the Wiccan priestess, the lay Jewish man, and the Baha'i congregation leader mentioned above.

In all, there were roughly 130 different invocations between 1999 and June 2010, of which more than 120 are contained within the record.[1] The invocations in the record typically gave thanks for aspects of the life of the town and requested assistance with the ongoing project of town governance. After being introduced, prayer-givers tended to begin with some variant of "let us pray," and then to speak about the matters for which "we" pray, ostensibly on behalf of the audience or the town more broadly. Members of the audience and the Board have bowed their heads, stood, and participated in the prayers by saying "Amen." On a few occasions, some members of the Town Board have made the sign of the cross.

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[1] Galloway and Stephens assert that between 1999 and June 2010, at least 132 spoken prayers were delivered at Board meetings. They have identified 135 Board meetings during this period, but claim that there is no evidence regarding the delivery or content of prayers at three of the meetings. Galloway and Stephens also assert that transcripts of 124 of these 132 prayers are available in the record. The town does not dispute these figures. We, however, have only been able to identify transcripts of 121 prayers in the record.

A substantial majority of the prayers in the record contained uniquely Christian language. Roughly two-thirds contained references to "Jesus Christ," "Jesus," "Your Son," or the "Holy Spirit." Within this subset, almost all concluded with a statement that the prayer had been given in Jesus Christ's name. Typically, prayer-givers stated something like, "In Jesus's name we pray," or "We ask this in Christ's name." Some prayer-givers elaborated further, describing Christ as "our Savior," "God's only son," "the Lord," or part of the Holy Trinity. One prayer, for example, was given "in the name of the Lord and Savior Jesus Christ, who lives with you and the Holy Spirit, one God for ever and ever." Other prayers, including ones not expressly made in Christ's name, spoke of "the role of the Holy Spirit in our lives," and celebrated Christ's birth and resurrection.

The remaining third of the prayers spoke in more generically theistic terms. Christian clergy delivered prayers referring to "God of all creation," "Heavenly Father," and God's "kingdom of Heaven." The lay Jewish prayer-giver spoke of "God," the "Father," and the "Lord"; he also referenced, at one point, "the songs of David, your servant." The Baha'i prayer-giver referred generally to "God," concluding his prayer with the Baha'i greeting, "Alláh-u-Abhá," which loosely means "God the All Glorious." Finally, the Wiccan priestess invoked Athena and Apollo; she stated these were fitting deities given the Town's name.

Galloway and Stephens attended numerous Town Board meetings after the town initiated its

prayer practice in 1999.[2] In September 2007, they began complaining to town officials about the prayer practice, sometimes during public comment periods at Board meetings. In these informal complaints, the plaintiffs raised two types of objections, though they did not distinguish them as such. First, they asserted that the prayers aligned the town with Christianity. Second, they argued that the prayers were sectarian rather than secular. Town officials met with the plaintiffs and expressed the town's position that it would accept any volunteer to deliver the prayers and that it would not police the content of prayers. The town did not make any public response to the plaintiffs' complaints, however. Nor did it make any comment concerning the prayer delivered at an October 2007 meeting, which described objectors to the town's prayer practice as a "minority . . . ignorant of the history of our country."

In February 2008, the plaintiffs filed suit against the town and Auberger, challenging aspects of the prayer practice under the Establishment Clause. They made two arguments before the district court: (1) that the town's procedure for selecting prayer-givers unconstitutionally preferred Christianity over other faiths, and (2) that the prayer practice was impermissibly "sectarian." In support of their position, the plaintiffs reiterated the same objections they had raised before the Town Board prior to filing suit.

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[2] Stephens started attending meetings in 2001, and Galloway began in 2005. At the time of their complaint, both plaintiffs recalled the prayers at three meetings in particular, with one overlapping meeting between the two of them. In their complaint, they asserted that they had attended other meetings as well. There is no dispute that the plaintiffs have attended nearly every meeting since they started objecting to the invocations.

They claimed, as an initial matter, that the prayer practice aligned the town with Christianity, and that it therefore established a particular religion. They also pointed out that the prayer practice employed language unique to specific religious sects, and asserted that in so doing it established religion generally. The plaintiffs again did not distinguish between these arguments, nor have they done so on appeal.

The district court, on cross-motions for summary judgment, entered judgment for the defendants. *Galloway v. Town of Greece*, 732 F. Supp. 2d 195 (W.D.N.Y. 2010). At the outset, the district court dismissed the plaintiffs' claims against Auberger as redundant of their claims against the town. *Id.* at 214. After holding that the plaintiffs had Article III standing to sue the town, the district court turned to the merits of their two arguments. *Id.* at 214-15. As to the plaintiffs' challenge regarding the town's prayer selection process, the district court held that the plaintiffs had failed to advance any credible evidence that town employees intentionally excluded representatives of particular faiths. *Id.* at 215-19. As to the plaintiffs' contention regarding the sectarian content of the prayers, the district court held that, under binding Supreme Court case law, the Establishment Clause does not foreclose denominational prayers. The court concluded for these, and for a number of case-specific reasons, that the plaintiffs had failed to show that the town's prayer practice had the effect of establishing the Christian religion. *Id.* at 238-43.

II. DISCUSSION

This appeal presents a narrow subset of the questions raised before the district court. Galloway and Stephens do not assert that the district court

erred in dismissing their claims against Auberger. They have, moreover, expressly abandoned the argument that the town intentionally discriminated against non-Christians in its selection of prayer-givers. Accordingly, the only live issue on appeal is whether the district court erred in rejecting the plaintiffs' assertion that the town's prayer practice had the effect, even if not the purpose, of establishing religion.

We review a grant of summary judgment de novo. *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 914 (2d Cir. 2010). "Summary judgment is warranted only where construing all the evidence in the light most favorable to the non-movant and drawing all reasonable inferences in that party's favor, there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." *Giordano v. Mkt. Am., Inc.*, 599 F.3d 87, 93 (2d Cir. 2010) (quoting *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 96 (2d Cir. 2009)) (internal quotation marks omitted).

A.

As far as we are aware, this is the first instance in which this court has had occasion to consider the validity of a legislative prayer practice under the Establishment Clause. Our analysis must begin with *Marsh v. Chambers*, 463 U.S. 783, (1983), the only Supreme Court decision cited to us that has ruled on the constitutionality of legislative prayer. *Marsh* held that the Nebraska legislature's practice of opening its sessions with a prayer, delivered by a state-employed clergyman, did not violate the Establishment Clause. *Id.* at 793. In so holding, *Marsh* did not employ the three-pronged test the Court had adopted, eleven years earlier, in *Lemon v. Kurtzman*,

403 U.S. 602, 612-13, (1971), for Establishment Clause cases. *Marsh*, 463 U.S. at 793-95; *see also Edwards v. Aguillard*, 482 U.S. 578, 583 n.4, (1987). Rather, the *Marsh* Court conducted a largely historical analysis, looking to the "unique history" of legislative prayer in America before turning to the particulars of the Nebraska Legislature's chaplaincy program. *Marsh*, 463 U.S. at 791-95.

The Court first held that state-funded legislative prayer does not necessarily run afoul of the Establishment Clause. It relied primarily on the fact that the First Congress appointed paid chaplains and opened legislative sessions with prayer, and reasoned that "[c]learly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment." *Id.* at 788. The Court also found that delegates to the First Congress "did not consider opening prayers as a proselytizing activity or as symbolically placing the government's 'official seal of approval on one religious view,'" *id.* at 792, (quoting *Chambers v. Marsh*, 675 F.2d 228, 234 (8th Cir. 1982)), but rather viewed them as "'conduct whose . . . effect . . . harmonize[d] with the tenets of some or all religions,'" *id.* (alterations in original) (quoting *McGowan v. Maryland*, 366 U.S. 420, 422 (1961)). "To invoke Divine guidance on a public body entrusted with making the laws," the Court held, is "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.*

Turning to Nebraska's practice, the Court dismissed three concerns raised by the state legislator who was plaintiff in the case. First, it rejected the argument that the sixteen-year tenure of the legislative chaplain, Robert E. Palmer, had "the effect of

giving preference to his religious views." *Id.* at 793. The evidence, the Court noted, suggested that Palmer was reappointed because of his performance and indicated that guest chaplains and substitutes had officiated at various times. *Id.* The Court held that "[a]bsent proof that the chaplain's reappointment stemmed from an impermissible motive," Palmer's long tenure did not "in itself" violate the Establishment Clause. *Id.* at 793-94.

Second, the Court rejected the claim that Palmer's compensation from public funds conflicted with the Establishment Clause. It again noted that the First Congress had paid its chaplain, as had the Continental Congress and various state legislatures at the time of the Constitutional Convention. *Id.* at 794. The Court also relied on the fact that both Congress and many state legislatures had long since continued to compensate chaplains who delivered legislative prayers. *Id.*

Third, the Court rejected the argument that the "Judeo-Christian" content of the prayers established religion. In describing the facts underlying this portion of the plaintiff's complaint, the Court reported that Palmer had characterized his prayers as "'nonsectarian,' 'Judeo Christian,' and with 'elements of the American civil religion.'" *Id.* at 793 n.14. It also pointed out that "[a]lthough some of his earlier prayers were often explicitly Christian, Palmer removed all references to Christ after a 1980 complaint from a Jewish legislator." *Id.* In responding to plaintiff's argument, the Court reasoned that "[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-

95. For these reasons, the Court concluded, it was not necessary for it "to embark on a sensitive evaluation or to parse the content of a particular prayer." *Id.* at 795.

Six years later, however, in a case that did not involve a challenge to legislative prayer, the Supreme Court suggested that legislative prayers invoking particular sectarian beliefs may, on the basis of those references alone, violate the Establishment Clause. The decision, *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), rejected the argument that *Marsh*'s historical analysis validated a city's holiday crèche display. The Court wrote: "However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed." *Id.* at 603 (footnote omitted). *Marsh,* it reasoned, recognized that history could not justify current practices "that have the effect of affiliating the government with any one specific faith or belief." *Id.* The prayers in *Marsh* "did not violate this principle," according to the Court, "because the particular chaplain had 'removed all references to Christ.'" *Id.* (quoting *Marsh*, 463 U.S. at 793 n.14).

As read by *Allegheny*, *Marsh* has remained a fixed point within the High Court's Establishment Clause jurisprudence. Three years later, in striking down a public school district's practice of including prayer in its graduation ceremonies, the Court distinguished *Marsh* in light of "[i]nherent differences between the public school system and a session of a state legislature." *Lee v. Weisman*, 505 U.S. 577, 596 (1992). In doing so, it pointed specifically to the dif-

ference between "[t]he influence and force of a formal exercise in a school graduation" as against a legislative session. *Id.* at 597. More recently, in noting that "Establishment Clause doctrine lacks the comfort of categorical absolutes," the Court invoked *Marsh* as an instance in which it had "found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious." *McCreary Cnty., Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 860 n.10 (2005).

B.

Various circuit court decisions, drawing on the Court's language in *Allegheny*, have questioned the validity of all forms of "sectarian" prayers. In the most recent of these, Judge Wilkinson wrote for the Fourth Circuit that *Marsh* and *Allegheny*, read together, seek both to acknowledge that legislative prayer can "solemnize the weighty task of governance" and to minimize the risks of "sectarian strife" such prayer may generate by requiring that invocations "embrace a non-sectarian ideal." *Joyner v. Forsyth Cnty., N.C.*, 653 F.3d 341, 347 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012); *see also Hinrichs v. Bosma*, 440 F.3d 393, 399 (7th Cir. 2006) (holding that the Supreme Court, in *Allegheny*, "read *Marsh* as precluding sectarian prayer"); *Stein v. Plainwell Cmty. Schs.*, 822 F.2d 1406, 1409 (6th Cir. 1987) (reading *Marsh*, prior to *Allegheny*, to hold that prayers will violate the First Amendment if they go "beyond 'the American civil religion'" (quoting *Marsh*, 463 U.S. at 793 n. 14)).

To the extent that these circuit cases stand for the proposition that a given legislative prayer practice, viewed in its entirety, may not advance a single religious sect, we cannot disagree. Under *Marsh*,

legislative prayers may not be "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95. It is also clear, under *Allegheny,* that legislative prayers may not "have the effect of affiliating the government with any one specific faith or belief." *Allegheny*, 492 U.S. at 603. *Joyner*, *Hinrichs*, and *Stein* might be read simply to reiterate these standards, rather than to construe *Marsh* and *Allegheny* as precluding denominational content in any individual prayer. Construed in this fashion, the distinction between sectarian and nonsectarian prayers merely serves as a shorthand, albeit a potentially confusing one, for the prohibition on religious advancement or affiliation outlined in *Marsh* and *Allegheny.*

To the extent that these circuit cases stand instead for the proposition that the Establishment Clause precludes all legislative invocations that are denominational in nature, however, we cannot agree. The line between sectarian and nonsectarian prayers, though perhaps the least defective among various possible distinctions that can be drawn in this area, runs into two sizable doctrinal problems.

First, the Supreme Court has explicitly rejected the notion that the government "may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds." *Lee*, 505 U.S. at 590. Admittedly, *Lee*, which postdated both *Marsh* and *Allegheny*, did not involve legislative prayer. But its language was seemingly unequivocal. The *Lee* Court held that the defendant public school district had violated the Establishment Clause when it advised a rabbi that his prayers at the school's graduation ceremony "should be nonsectarian." *Id.* at 588. A state-imposed re-

quirement that all legislative prayers be nondenominational, the Court reasoned, begins to sound like the establishment of "an official or civic religion." *Id.* at 590. Indeed, *Lee* made express its disagreement with the Sixth Circuit's contrary language in *Stein*. *Id.* at 589. The problem with such civic religious statements lies, in part, in the danger that such efforts to secure religious "neutrality" may produce "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring); *see also Lee*, 505 U.S. at 589-90 (expressing similar concerns). Under the First Amendment, the government may not establish a vague theism as a state religion any more than it may establish a specific creed.

The second difficulty with the simple sectarian/nonsectarian approach seemingly adopted by some circuits is that the touchstone of our analysis must be *Marsh*, which is hard to read, even in light of *Allegheny*, as saying that denominational prayers, in and of themselves, violate the Establishment Clause. It is true that *Allegheny* pointed out that the prayers in *Marsh* did not have "the effect of affiliating the government with any one specific faith or belief . . . . because the particular chaplain had 'removed all references to Christ.'" 492 U.S. at 603 (quoting *Marsh*, 463 U.S. at 793 n.14). But this does not mean that any *single* denominational prayer has the forbidden effect of affiliating the government with any one faith. A series of denominational prayers, each delivered in the name of a different sect, could hardly be perceived as having this effect. *Cf. Pelphrey v. Cobb Cnty., Ga.*, 547 F.3d 1263, 1277-78 (11th Cir. 2008) (upholding a prayer practice in part

because prayers referenced Allah, Mohammed, and the Torah in addition to Christ). At any rate, the chaplain's categorization of the prayers in *Marsh* as "nonsectarian" was plainly contestable with respect to prayers delivered prior to the 1980 complaint. *See Marsh*, 463 U.S. at 793 n.14 (describing some of these prayers as "often explicitly Christian"); *id.* at 823-24 (Stevens, J., dissenting) (quoting one of the chaplain's prayers). And it is not even clear that the removal of references to Christ rendered all post-1980 prayers nondenominational.

Accordingly, our inquiry cannot look solely to whether the town's legislative prayer practice contained sectarian references. We must ask, instead, whether the town's practice, viewed in its totality by an ordinary, reasonable observer, conveyed the view that the town favored or disfavored certain religious beliefs.[3] In other words, we must ask whether the town, through its prayer practice, has established particular religious beliefs as the more acceptable ones, and others as less acceptable. This inquiry, for its part, must be made in the light of the particular

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[3] The town appears to argue that, because the plaintiffs do not contest the district court's ruling that the town did not intentionally favor Christian prayer-givers, the plaintiffs cannot show an Establishment Clause violation. This argument rests, apparently, on the view that to "proselytize or advance any one, or to disparage any other, faith or belief," within the meaning of *Marsh*, requires intent. *See Marsh*, 463 U.S. at 794-95. We disagree. *Marsh* did not speak of scienter. Rather, it held as it did after rejecting the argument that aspects of the prayer practice had the *effect* of giving preference to particular religious views. *See id.* at 793. *Allegheny*, moreover, held that *Marsh* had found that the prayers did not "have the *effect* of affiliating the government with any one specific faith or belief." *Allegheny*, 492 U.S. at 603 (emphasis added).

prayer practice upheld in *Marsh* and addressed in *Allegheny*. As a result, it is clear, for example, that the longstanding appointment of a single Christian clergyman does not, *in itself,* convey the prohibited favoritism, and the same is apparently true of "Judeo-Christian" prayers that make no reference to Christ. Beyond that, however, any number of different legislative prayer practices could be read to yield any number of messages—acceptable or forbidden—about religion.

C.

Within these confines, we see "no test-related substitute for the exercise of legal judgment." *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in the judgment). In *Marsh*, as we have noted, the Supreme Court did not employ the *Lemon* test; nor did it adopt any other precise criteria to govern cases involving legislative prayer. Instead, the decision addressed a series of case-specific concerns raised by the plaintiff. In fact-intensive cases like this one, which defy exact legal formulas, the exercise of "legal judgment" is not the same as the exercise of "personal judgment"; it must "reflect and remain faithful to the underlying purposes" of the relevant constitutional provisions, and it must "take account of context and consequences measured in light of those purposes." *Id.* With that in mind, we turn to the specific factual history in this case.[4]

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[4] On appeal, the defendants do not dispute that the plaintiffs have standing to sue. The defendants argue, however, that the plaintiffs do not have standing to challenge what was said in Town Board meetings which the plaintiffs have no specific memory of attending. The Supreme Court did not adopt such a restrictive view of the prayer practice under challenge in *Marsh*. Nor has any circuit, as far as we are aware, adopted

We conclude, on the record before us, that the town's prayer practice must be viewed as an endorsement of a particular religious viewpoint. This conclusion is supported by several considerations, including the prayer-giver selection process, the content of the prayers, and the contextual actions (and inactions) of prayer-givers and town officials. We emphasize that, in reaching this conclusion, we do not rely on any single aspect of the town's prayer practice, but rather on the totality of the circumstances present in this case.

The town's process for selecting prayer-givers virtually ensured a Christian viewpoint. Christian clergy delivered each and every one of the prayers for the first nine years of the town's prayer practice, and nearly all of the prayers thereafter. In the town's view, the preponderance of Christian clergy was the result of a random selection process. The randomness of the process, however, was limited by the town's practice of inviting clergy almost exclusively from places of worship located within the town's borders. The town fails to recognize that its residents may hold religious beliefs that are not represented by a place of worship within the town. Such resi-

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such a view in assessing a challenge to legislative prayer. Indeed, in *Pelphrey*, the Eleventh Circuit found the plaintiffs had standing, as municipal taxpayers, to challenge the defendant county's prayer practice in its entirety. 547 F.3d at 1280-81; *see also Joyner*, 653 F.3d at 349-50 (considering the defendant county's prayer practice in its entirety in assessing a challenge brought by plaintiffs who filed suit after hearing one prayer); *Wynne v. Town of Great Falls, S.C.*, 376 F.3d 292, 294, 298-302 (4th Cir. 2004) (considering the defendant county's prayer practice as a whole in assessing a challenge brought by a plaintiff who "regularly attended" Town Council meetings). We decline to adopt a more restrictive approach here.

dents may be members of congregations in nearby towns or, indeed, may not be affiliated with any congregation. The town is not a community of religious institutions, but of individual residents, and, at the least, it must serve those residents without favor or disfavor to any creed or belief.[5]

In our view, whether a town's prayer-selection process constitutes an establishment of religion depends on the extent to which the selection process results in a perspective that is substantially neutral amongst creeds. The town asserts, and there is no evidence to the contrary, that it would have accepted any and all volunteers who asked to give the prayer. But the town neither publicly solicited volunteers to deliver invocations nor informed members of the general public that volunteers would be considered or accepted, let alone welcomed, regardless of their religious beliefs or non-beliefs. Had the town publicly opened its prayer practice to volunteers in this way, its selection process could be defended more readily as random in the relevant sense.

We need not "embark on a sensitive evaluation" or "parse the content of a particular prayer," *Marsh*, 463 U.S. at 795, to recognize that most of the prayers at issue here contained uniquely Christian references and that prayers devoid of such references almost never employed references unique to some other faith.[6] It is no small thing for a non-Christian (or

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[5] The randomness of the selection process was further undermined, moreover, by the reliance of the administrative personnel managing the process on a subset of the already-narrowed list consisting of a cadre of recurrent volunteers who were willing to appear frequently to give the invocation.

[6] The town asserts that we may not consider the content of prayers absent an independent showing that the prayer oppor-

for a Christian, for that matter) to pray "in the name of Jesus Christ." Prayers delivered in this fashion invoke "a deity in whose divinity *only* those of the Christian faith believe," *Wynne v. Town of Great Falls, S.C.*, 376 F.3d 292, 300 (4th Cir. 2004), and do so to the clear exclusion of other faiths. References to Christ as "Our Savior" and invocations of the Holy Trinity do the same thing. *See Joyner*, 653 F.3d at 349-50.

The sectarian nature of the prayers, we emphasize, was not inherently a problem. The prayers in the record were not offensive in the way identified as problematic in *Marsh*: they did not preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like. Prayers of this more offensive sort might be sufficient in themselves to give rise to an Establishment Clause violation. But we need not determine whether any single prayer at issue here suffices to give such an indication of establishment,[7] since we find that on the totality of the

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tunity has "been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95. This reads *Marsh*, particularly in light of *Allegheny*, too narrowly. We agree that "courts should not be in the business of policing prayers for the occasional sectarian reference," but this does not mean that courts may not consider, more broadly, the substance of the prayers under challenge. *Joyner*, 653 F.3d at 351. The other circuits that have addressed the issue, while acknowledging the limits on "parsing" prayers, have consistently looked to substance in this fashion. *See id.*; *Pelphrey*, 547 F.3d at 1277-78; *Hinrichs*, 440 F.3d at 399; *see also Wynne*, 376 F.3d at 299 n.4 (holding that its reliance on findings that challenged prayers "'frequently' invoked 'Jesus, Jesus Christ, Christ, or Savior,'" did not amount to "parsing" of prayers).

[7] We note, however, that prayers that overtly disparage those who dissent from the prayer policy as "ignorant," as at least one prayer did, or that conclude by taking up a collection on behalf

circumstances presented the town's prayer practice identified the town with Christianity in violation of the Establishment Clause.

The town had an obligation to consider how its prayer practice would be perceived by those who attended Town Board meetings. And, despite the homogeneity of viewpoints reflected by the invocations, the town did not explain that it intended the prayers to solemnize Board meetings, rather than to affiliate the town with any particular creed. The town never informed prayer-givers that invocations were not to be "exploited as an effort to convert others to the particular faith of the invocational speaker, nor to disparage any faith or belief different than that of the invocational speaker." *Joyner*, 653 F.3d at 343. Absent any effort on the part of the town to explain the nature of its prayer program to attendees, the rare handful of cases, over the course of a decade, in which individuals from other faiths delivered the invocation cannot overcome the impression, created by the steady drumbeat of often specifically sectarian Christian prayers, that the town's prayer practice associated the town with the Christian religion.

We ascribe no religious animus to the town or its leaders. The town's desire to mark the solemnity of its proceedings with a prayer is understandable; Americans have done just that for more than two hundred years. But when one creed dominates others—regardless of a town's intentions—constitutional concerns come to the fore. There is no

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of a particular congregation, as another did, tread perilously close, if they do not overstep, the line between legitimate legislative prayer and the identification of government with religion and religion with government. These incidents, however, appear to have been isolated.

doubt that the town seeks to convey respect for the invocations given at its meetings. But efforts to show respect for a belief espoused in a legislative prayer entail a concomitant obligation to demonstrate respect for the beliefs of others.

Finally, it is relevant, and worthy of weight, that most prayer-givers appeared to speak on behalf of the town and its residents, rather than only on behalf of themselves. Prayer-givers often requested that the audience participate, and spoke in the first-person plural: let "us" pray, "our" savior, "we" ask, and so on. Town officials, whether intentionally or not, contributed to the impression that these prayer-givers spoke on the town's behalf. After many of the prayer-givers finished their invocations, Auberger thanked them for being "our chaplain of the month." There was testimony, as well, that members of the Town Board participated in the prayers by bowing their heads, saying "Amen," or making the sign of the Cross. The invitation to audience members to participate in the prayer, particularly by physical means such as standing or bowing their heads, placed audience members who are nonreligious or adherents of non-Christian religion in the awkward position of either participating in prayers invoking beliefs they did not share or appearing to show disrespect for the invocation, thus further projecting the message that the town endorsed, and expected its residents to endorse, a particular creed.[8]

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[8] Galloway and Stephens contend that the presence of children at Board meetings raises a threat of religious coercion akin to the threat at issue in *Lee*, 505 U.S. 577, and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). The prospect of coercion is surely relevant to whether a legislative prayer practice runs afoul of the Establishment Clause. In *Marsh*, the Su-

On the record before us, taking into account all of these contextual considerations in concert, we reverse the grant of summary judgment. We conclude that an objective, reasonable person would believe that the town's prayer practice had the effect of affiliating the town with Christianity. In reaching this conclusion, we underscore that we do not rely on any single aspect of the town's prayer practice, but rather the interaction of the facts present in this case. The extent to which a given act conveys the message of affiliation, or fails to do so, will depend on the various circumstances that circumscribe it. Accordingly, we do not aim to specify what the Establishment Clause allows, but restrict ourselves to noting the ways in which this town must be read to have conveyed a religious affiliation.

It is true that contextual inquiries like this one can give only limited guidance to municipalities that wish to maintain a legislative prayer practice and still comply with the mandates of the Establishment Clause. As the foregoing indicates, a municipality cannot—in our judgment—ensure that its prayer practice complies with the Establishment Clause simply by stating, expressly, that it does not mean to affiliate itself with any particular faith. Nor can a municipality insulate itself from liability by adopting a lottery to select prayer-givers or by actively pursuing prayer-givers of minority faiths whose members

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preme Court took care to note that the "individual claiming injury" in that case was "an adult, presumably not readily susceptible to 'religious indoctrination,' or peer pressure." 463 U.S. at 792, (citations omitted) (quoting *Tilton v. Richardson*, 403 U.S. 672, 686 (1971)). In this case, however, as in *Marsh*, the plaintiffs are adults. And there is no reason to believe that children are any more present in Board meetings than they were in meetings of the Nebraska legislature.

reside within the town.[9] Similarly, there is no substantive mixture of prayer language that will, on its own, necessarily avert the appearance of affiliation.[10] Ultimately, municipalities must consider their prayer practices in context and as a whole. A municipality must ask itself whether what it does, in context, reasonably can be seen as endorsing a particular faith or creed over others. That is the delicate balancing act required by the Establishment Clause and its jurisprudence.

D.

We emphasize what we do not hold. We do not hold that the town may not open its public meetings with a prayer or invocation. Such legislative prayers, as *Marsh* holds and as we have repeatedly noted, do not violate the Establishment Clause. Nor do we hold that any prayers offered in this context must be blandly "nonsectarian." A requirement that town officials censor the invocations offered—beyond the limited requirement, recognized in *Marsh*, that prayer-givers be advised that they may not proselytize for, or disparage, particular religions—is not only not required by the Constitution, but risks establishing a "civic religion" of its own. Occasional prayers recognizing the divinities or beliefs of a particular creed, in a context that makes clear that the town is not endorsing or affiliating itself with that creed or, more

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[9] The task would be particularly delicate where a town is so much of one creed that even such approaches would, like a truly random selection process, nonetheless yield prayer-givers overwhelmingly of that creed.

[10] Even if there were such a substantive mixture, municipalities face constitutional limits on their ability to instruct prayer-givers about the permissible content of prayers. *See Lee*, 505 U.S. at 588-89.

broadly, with religion or non-religion, are not offensive to the Constitution. Nor are we adopting a test that permits prayers in theory but makes it impossible for a town in practice to avoid Establishment Clause problems. To the contrary, it seems to us that a practice such as the one to which the town here apparently aspired—one that is inclusive of multiple beliefs and makes clear, in public word and gesture, that the prayers offered are presented by a randomly chosen group of volunteers, who do not express an official town religion, and do not purport to speak on behalf of all the town's residents or to compel their assent to a particular belief—is fully compatible with the First Amendment.

What we do hold is that a legislative prayer practice that, however well-intentioned, conveys to a reasonable objective observer under the totality of the circumstances an official affiliation with a particular religion violates the clear command of the Establishment Clause. Where the overwhelming predominance of prayers offered are associated, often in an explicitly sectarian way, with a particular creed, and where the town takes no steps to avoid the identification, but rather conveys the impression that town officials themselves identify with the sectarian prayers and that residents in attendance are expected to participate in them, a reasonable objective observer would perceive such an affiliation.

People with the best of intentions may be tempted, in the course of giving a legislative prayer, to convey their views of religious truth, and thereby run the risk of making others feel like outsiders. Even if all prayer-givers could resist this temptation, municipalities with the best of motives may still have trouble preventing the appearance of religious affiliation.

Ours is a society splintered, and joined, by a wide a constellation of religious beliefs and non-beliefs. Amidst these many viewpoints, even a single circumstance may appear to suggest an affiliation. To the extent that the state cannot make demands regarding the content of legislative prayers, moreover, municipalities have few means to forestall the prayer-giver who cannot resist the urge to proselytize. These difficulties may well prompt municipalities to pause and think carefully before adopting legislative prayer, but they are not grounds on which to preclude its practice.

CONCLUSION

For the foregoing reasons, we REVERSE the district court's grant of summary judgment and REMAND for further proceedings consistent with this opinion. We leave it to the district court, with the assistance of the parties, to craft appropriate relief.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SUSAN GALLOWAY and
LINDA STEPHENS,

Plaintiffs,

-vs-

TOWN OF GREECE
and JOHN AUBERGER,
in his official capacity as
Town of Greece Supervisor,

Defendants.

No. 08-cv-6088
CJS(P)

DECISION AND
ORDER

* * *

INTRODUCTION

This is an action brought pursuant to 42 U.S.C. § 1983[1], in which the plaintiffs, Susan Galloway and Linda Stephens ("Plaintiffs"), allege that the practice of the Town of Greece's ("Defendant" or "the Town") of opening Town Board meetings with prayer violates

[1] Complaint ¶¶ 82-83 ("The practices of excluding non-Christians as prayer-givers and of sponsoring sectarian prayers at Town Board meetings constitute the custom and policy of the Town of Greece, thereby subjecting the Town to liability under 42 U.S.C. § 1983. By violating the Establishment Clause . . . Defendants have . . . deprived Plaintiffs of rights secured by the First and Fourteenth Amendments to the U.S. Constitution, entitling them to a remedy under 42 U.S.C. § 1983."

the Establishment Clause of the First Amendment to the United States Constitution. Plaintiffs, who are Jewish and Atheist, respectively, maintain that the Town has "aligned itself with" Christianity, because the vast majority of clergy selected to give prayers at town board meetings were Christian. In this regard, Plaintiffs contend that the Town has intentionally excluded non-Christians from offering prayers at meetings. Additionally, Plaintiffs contend that the town has impermissibly allowed "sectarian" prayer by members of both Christian and non-Christian faiths.

Now before the Court are the parties' cross-motions for summary judgment. For the reasons that follow, Defendants' motion for summary judgment is granted, Plaintiffs' motion for summary judgment is denied, and this action is dismissed.

BACKGROUND

Defendant is a municipal corporation located in Monroe County, New York. Defendant John Auberger ("Auberger") [illegible] is being sued in his official capacity, has, at all relevant times, been the elected Supervisor of the Town. At all relevant times the Greece Town Board has met once each month. Prior to 1999, the Town observed a moment of silence at the start of Town Board meetings. In 1999, the Town began inviting local clergy to offer oral prayer at the start of Board meetings. Auberger instituted this practice after observing that the Monroe County Legislature started its sessions with prayer. At all relevant times the Moment of Prayer was listed as part of the Board's meeting agenda.

The Town has no written policy concerning prayer at Board meetings. The Town has never set any

guidelines concerning the content of prayers, and has never asked to review the wording of prayers prior to their delivery at Town Board Meetings. Town Officials state that they would not censor an invocation, even if it was offensive, or even if it was not a prayer in the traditional sense. Firkins Dep. 187, 231-232, 249-251; Auberger Dep. 174-189.[2] For example, the Town has indicated that Atheists are welcome to offer "prayers." The Town maintains that anyone who expressed an interest in giving an invocation at a Town Board meeting would have been permitted to do so, without having to provide any information concerning the content of the prayer. The Town has never rejected a request to offer a prayer. At the same time, however, the Town has never publicized that individuals are welcome to offer prayers.

Religious groups in the Town[3] are predominantly Christian. Stephens Dep. at 29. In that regard, although Plaintiffs have each lived in the Town more than thirty years, neither was personally familiar with any mosques, synagogues, temples, or other non-Christian places of worship within the Town. *See,* Stephens Dep. at 28-30; Galloway Dep. at 36-37.

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[2] McCann indicated that if someone who indicated that they were from a "white supremacist church" asked to give a prayer, he would want to consult with legal counsel first. (McCann Dep. 104-105).

[3] It was the Town's preference and intention to invite representatives of churches or groups that were physically located in the Town of Greece. Firkins Dep. 148, 150-162; *see also, id.* at 153-154 ("The way in which the list was established . . . is to invite Greece-Town of Greece clergy, houses of worship, individuals to give the prayer, because this is the Town of Greece."). However, Town employees were not specifically instructed to contact only those religious groups located within the Town. (Firkins Dep. 177).

More specifically, neither Galloway, Stephens, or Auberger for that matter, were aware of any Jewish, Muslim, Mormon, Buddhist, or Hindu houses of worship in the Town. Galloway Dep. at 36; Stephens Dep. at 28-29; Auberger Dep. at 63-64, 109.

At all relevant times, responsibility for inviting clergy to deliver prayers at Board meetings was delegated to the Town's Office of Constituent Services ("Constituent Services").[4] Three Constituent Services clerical employees, Linda Sofia ("Sofia"), Geri Wagoner ("Wagoner"), and Michele Fiannaca ("Fiannaca"), were responsible for this task at different times.

March 1999-February 2005

Sofia was the first employee given the job of inviting clergy to give prayers at Town Board meetings, and she performed that duty for most of the period at issue in this lawsuit, from approximately March 1999 until approximately February 2005. (Defendants' Statement of Undisputed Facts [# 33-3] ¶¶ 17, 21). Sofia arranged for clergy to give invocations by telephoning religious organizations that were listed in the "Community Guide," a directory published periodically by the Greece Chamber of Commerce. Sofia randomly called organizations listed in the Community Guide until she found a clergy member who was willing to give an invocation. The record does not contain copies of the actual Community Guide(s) published during the relevant period that Sofia performed this task. Instead, the

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[4] As will be discussed below, in recent years some individuals who are not clergy have volunteered to give prayers. However, the only people invited by the Town to give prayers have been clergy.

record contains only a copy of a Community Guide dated "Spring/Summer 2006," published after Sofia ceased performing the task of inviting clergy. (Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 6). Defendants produced this copy as part of discovery, but indicate that they do not know from where this particular document came. (Defendants' Supplemental Discovery Responses, Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 8, response no. 10) ("Defendants do not know who provided this exact document.").

Sofia states that she never intentionally failed to contact any organization listed in the Community Guide. (Defendants' Statement of Undisputed Facts [# 33-3] ¶ 17). On this point, Sofia, who was not deposed as part of this action, states in an affidavit: "I did not intentionally omit any church, but called all churches on the list until I was able to find a person who agreed to give a short invocation at the meeting. However, my recollection[5] of who I called and when is not clear at all." (Sofia Aff. [# 33-11] ¶ 5). Sofia indicates that she never declined to contact an organization based on its religious affiliation. (*Id.* at ¶ 7).

In or about January 2003, Sofia began keeping a list of all clergy who agreed to give prayers at Town Board Meetings. (Defendants' Appendix to Local Rule 56.1 Statement, Exhibit 14, numbered pages 32-35). Sofia referred to the document as her "Town Board Chaplains" list, and indicates that the list was not intended to include all potential clergy, but only those who had accepted her invitations to give invocations. (Sofia Aff. [# 33-11] ¶ 6) ("I recorded the

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[5] The affidavit is dated January 20, 2009, some four years after Sofia last performed the job of inviting clergy.

name of the person who agreed to give the short invocation. My list was not a list of all potential prayer-givers, but only those persons who I called and who agreed to give the invocation.").

Between March 1999 and February 2005, representatives of the following religious organizations gave invocations at Town Board meetings: Greece Assembly of God (14 times); First Bible Baptist Church (9 times); West Side Baptist Church (4 times); Holy Name of Jesus Church (2 times); Our Mother of Sorrows Church (8 times); St. John the Evangelist Church (1 time); St. Charles Borromeo Church (2 times); St. Lawrence Church (3 times); English Road Alliance Church (4 times); Shepherd's Heart Christian Fellowship (7 times); Hope Lutheran Church (1 time); Aldersgate United Methodist Church (4 times); Lakeshore Community Church (3 times); New Testament Christian Church (1 time); and John Knox Presbyterian Church (1 time).[6]

As noted earlier, the record does not contain contemporaneous Community Guide listings of religious organizations for the period 1999 through 2005. However, all of the religious groups listed above appear in the Spring/Summer 2006 Community Guide that is contained in the record. The 2006 listing also contains a number of religious groups that did *not* give invocations during the period March 1999 through February 2005, and specifically: Greece Baptist Church, Latta Road Baptist Church, Our Lady of Mercy Church, St. Mark's Church, Trinity

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[6] On May 13, 1999 and September 19, 2000, the Town Board observed a moment of silent prayer. (Plaintiffs' Appendix to Rule 56.1 Statement, Tab 33). On September 21, 1999, the Reverend Peg Shelton-Williamson, who is not identified with a particular group, gave the invocation. *Id.*

Episcopal Church, Northgate Bible Chapel, Lutheran Church of Concord, Messiah Lutheran, Greece United Methodist Church, Park Ridge Free Methodist, Wesley United Methodist Church, Church of Jesus Christ of Latter Day Saints, Immanuel Church of the Nazarene, Trinity Church of the Nazarene, Victory Community Church, The Good News Community Church, Lawson Road Church of Christ, New Way Christian Faith Center, Calvary Chapel of Greece, Abundant Life Worship Center, Bethany Presbyterian, Covenant Orthodox Presbyterian, Lakeview Community Church, and Parma Greece United. (Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 6). It is unclear whether any of these groups were listed in the earlier version(s) of the Community Guide that Sofia actually used. However, to the extent that they were, Sofia maintains that she would have called them to invite a representative to give a prayer, and that if a representative did not give a prayer, and thus did not appear on the Town Board Chaplains list, it was because he or she declined to do so. (Sofia Aff. [# 33-11] ¶¶ 4-5, 7; Sofia Aff. [# 37-5] ¶ 4).

March 2005-December 2006

Between approximately March 2005 and "some time prior to 2007," Wagoner was given the responsibility for inviting clergy to deliver invocations at Town Board meetings. (Defendants' Statement of Undisputed Facts, ¶¶ 21, 25). Like Sofia, Wagoner was not deposed as part of this litigation, however, she too provided an affidavit. (Wagoner Aff. [# 33-12]). When Wagoner assumed the job from Sofia, Sofia gave Wagoner her Town Board Chaplains list, which as discussed above, was a list of all individuals who had agreed to give prayers since January 2003.

Subsequently, Wagoner used Sofia's Town Board Chaplains list to contact clergy. Wagoner may also have used the Community Guide, although she does not specifically remember doing so.[78] (Wagoner Affidavit at ¶ 6). Wagoner randomly called organizations listed on the Town Board Chaplains List, and possibly the Community Guide, and did not intentionally fail to call any group. (*Id.* ¶¶ 6, 8) ("There were no churches that I specifically did not call."). Wagoner never rejected a request by anyone to give a prayer. (*Id.* at ¶ 8).

Between March 2005 and December 2006, representatives of the following religious organizations gave invocations at Town Board meetings: First Bible Baptist Church (1 time); West Side Baptist Church (1 time); Holy Name of Jesus (1 time); Our Lady of Mercy (1 time); Our Mother of Sorrows (1 time); St. John the Evangelist (1 time); St. Lawrence Church (1 time); English Road Alliance Church (1 time); Messiah Lutheran (1 time); Hope Lutheran Church (1 time); Park Ridge Free Methodist (1 time); Trinity Church of the Nazarene (1 time); Lakeshore Community Church (1 time); Calvary Chapel of Greece (2 times); Covenant Orthodox Presbyterian (1 time); and Lakeview Community Church (2 times).

All of the religious groups which Wagoner invited to give prayers were listed in the Community Guide

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[7] As noted below, Wagoner could not have relied solely on Sofia's list, since Wagoner invited at least five organizations to give prayers which had not given prayers during Sofia's tenure.

[8] Later, Wagoner received a spreadsheet ("the spreadsheet") containing a list of religious groups, though there is no evidence who prepared the list. There is also no evidence that Wagoner actually used the list, and to the contrary, Wagoner stated that she used Sofia's list and possibly the Community Guide.

dated Spring/Summer 2006.[9] The 2006 listing also contains a number of religious groups that did not give any invocations between 1999 and 2006, and specifically: Greece Baptist Church, Latta Road Baptist Church, St. Mark's Church, Trinity Episcopal, Northgate Bible Chapel, Lutheran Church of Concord, Wesley United Methodist Church, Church of Jesus Christ of Latter Day Saints, Immanuel Church, Victory Community Church, Good News Community Church, Lawson Road Church of Christ, New Way Christian Faith Center, Abundant Life Worship Center, Bethany Presbyterian, and Parma Greece United.

January 2007-Present

In or about January 2007, Fiannaca was assigned the task of inviting clergy to give prayers at Town Board meetings. At that time, Wagoner gave Fiannaca an accumulated file of information concerning potential prayer-givers, consisting of Sofia's Town Board Chaplins list and additional information that Wagoner had compiled. Subsequently, Fiannaca used the lists that she received from Wagoner, and updated them with the names of religious organizations appearing in the Religious Services Directory of the Greece Post, a weekly local newspaper. Fiannaca described her practice of inviting clergy to give prayers, as follows:

> I . . . believe that [Wagoner] gave me a spreadsheet list of churches in addition to a

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[9] This fact supports Wagoner's recollection that she may have used the Community Guide in addition to the Town Chaplains list, since at least five of the organizations which gave prayers during Wagoner's tenure had not given prayers during Sofia's tenure.

> document entitled 'Town Board Chaplains.' I used these documents, as well as the Greece Post [newspaper], to randomly call persons to give the short invocation. I constantly kept the list updated by writing notes on the lists for my use. In addition, I have received letters or post-it notes about certain churches, that I put in this file.

Fiannaca Aff. [# 33-10] ¶ 6. Fiannaca periodically reviewed the list of religious organizations published in the Greece Post, and updated her list with any new listings. Fiannaca Affidavit at ¶ 6; Fiannaca Dep. at 21-23, 25. Fiannaca would also cross out the names of individuals, but only if they were no longer associated with a particular church, or if they asked to be removed from the list. Fiannaca Dep. at 9-10, 37. Fiannaca intended that her list would include every religious organization listed in the Greece Post. *Id.* at 21-22, 24. Fiannaca never used the Community Guide or the yellow pages to invite clergy. *Id.* at 27.[10] Fiannaca believed that she was only supposed to invite individuals from religious organizations geographically located within the Town of Greece, and she believed that the organizations on her list fit that description. *Id.* at 14-17.

Fiannaca randomly called churches or clergy on her list, until she found someone who was willing to give the invocation. Fiannaca Dep. 6-7, 11-12, 51. However, there were certain clergy on the list who Fiannaca felt she could call whenever she could not find anyone else, because they would always agree to

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[10] Fiannaca was not familiar with the copy of the Greece Community Guide in the record, and stated that she never used it to call clergy. (Fiannaca Dep. 25-27, referring to Exhibit 45, Greece Community Guide Spring/Summer 2006).

give the invocation. Fiannaca Dep. at 53-54. Fiannaca stated that she had called everyone on her list at one time or another. Fiannaca Dep. at 10. In that regard, Fiannaca indicated that she believed she called the Bahai faith group in or about 2006. *Id.* at 62-63. Upon further questioning, Fiannaca stated that she was not sure whether she was thinking of the Bahai group or another church, the Morningstar church, but that if she had to bet, she believed it was the Bahai group. *Id.* at 70 ("If I'm going to bet, I think it was Bahai. But then I'm thinking, geez, I'm wondering if it was the Morningstar one that I was talking about. I don't know."); *see also, id.* at 73 ("I think I did [call Bahai] a couple of years ago when I first saw them, but I don't remember, but I'm thinking it could have been Morningstar. It was one or the other, *but you know what? I have called practically everybody on that list.*") (emphasis added). Fiannaca never rejected any request to give an invocation. Fiannaca Aff. at ¶ 12.

As part of discovery in this action, the Town produced the file that Fiannaca used when inviting clergy to give invocations.[11] The file included Sofia's Town Board Chaplain list, as well as lists compiled by Wagoner and possibly others. *See,* Plaintiff's Appendix to Local Rule 56.1 Statement, Tab 7 (Consisting of the file that Wagoner gave Fiannaca, as subsequently updated by Fiannaca). More specifically, in addition to the Town Board Chaplain list, the file contained a document with the handwritten title "new list," which appears to have been created prior

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[11] Fiannaca Aff. [# 33-10] ¶ 6 ("The lists that I call from were used during the depositions in this case and was referred to as Exhibit 52 [Plaintiff's Appendix to Local Rule 56.1 Statement, Tab 7].").

to October 2006.[12] (Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 7, pp. 6, 15). The list contains the names of thirty-two religious organizations, and includes all of the names listed in the Spring/Summer 2006 Community Guide, except: Church of Jesus Christ of Latter Day Saints, Abundant Life Worship Center, Parma Greece United, Immanuel Church of the Nazarene, Victory Community Church, The Good News Community Church, and the New Way Christian Faith Center.

The file also contained a document dated "10/2/2006," entitled "MasterPeopleListQuery." Plaintiff's Appendix to Local Rule 56.1 Statement, Tab 7, pp. 24, 28. The list contains thirty-seven names, and includes all of the organizations listed in the Greece Community Guide "Spring/Summer 2006" except five: Church of Jesus Christ of Latter Day Saints, Immanuel Church of the Nazarene, Victory Community Church, Abundant Life Worship Center, and Parma Greece United. *Id.* The list also contains three organizations that do not appear in the Spring/Summer 2006 Community Guide: Trinity Church, Destiny Prepar [sic] Church, and Morning Star Church. *Id.* The list also contains all of the organizations listed in an undated copy of the Religious Services Directory from the Greece Post, which appears in the record, except for nine: Abundant Life Worship Center; Baha'i Faith; Christian Bible Church; Episcopal Church of the Ascension; Journey Christian Church; Lakeside Presbyterian Church; St. George's Episcopal Church; Victory Community Church; and Victory Mountain Christian Fellowship.

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[12] The list has names handwritten on it, which are later incorporated into a typed list that is dated October 2, 2006, discussed further below.

Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 5.[13]

The file also contains a spread-sheet type document dated "2/20/2007." Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 7, pp. 14, 16. There is essentially no testimony from Fiannaca concerning this document, except that she testified that she did not personally type the document. The list contains the names of the same thirty-seven organizations that appear on the "10/2/2006" list, and is alphabetized.

Another updated list in Fiannaca's file is dated March 13, 2008, contains forty names.[14] The list is essentially the same as the "2/20/2007" list, except that it adds four additional names: Baha'i Faith,[15] Victory Community, Journey Christian Church, and Christian Bible Church. Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 7, pp. 9-10. As mentioned earlier, these names appear on the undated

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[13] Fiannaca stated that she received this list from Wagoner, along with Sofia's Chaplain's list. Fiannaca Dep. 34 ("I think that this might have been our original list.").

[14] On or about March 13, 2008, Fiannaca apparently received the updated list, without phone numbers, from Gail Burge ("Burge"), Auberger's secretary. Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 7, pp. 9-10. Fiannaca believes that Burge may have provided her with the list of names and addresses, and directed her to write in the updated telephone numbers. Fiannaca Dep. 31-33. However, Fiannaca is not absolutely sure who provided her with the typed portion of the document. Fiannaca Dep. at 68-69.

[15] Specifically as to the Baha'i faith organization, Fiannaca indicated that she added the group after its name appeared in the Greece Post. See, Fiannaca Dep. at 36-37 (Stating that she added three organizations after she saw them in the Greece Post: "New Way Christian Faith, Victory Mountain Christian Fellowship, and Baha'i Faith.").

copy of the Greece Post that is in the record, but did not appear on the "10/2/2006" list.

Fiannaca also added names to her lists when asked to do so. (Fiannaca Dep. at 8). For example, after this litigation was commenced, Fiannaca added Jen Zarpentine ("Zarpentine"), a Wiccan Priestess, and Dave Chikowsky ("Chikowsky"), a Jewish layman, to the list at their request. (Fiannaca Dep. at 18, 29).

Between January 2007 and December 2008, representatives of the following religious organizations gave invocations at Town Board meetings: First Bible Baptist Church (3 times), Our Mother of Sorrows (2 times), St. John the Evangelist (1 time), New Testament Christian Church (1 time), Greece Assembly of God (3 times), St. Charles Borromeo (2 times), Morning Star Christian Fellowship (1 time), Lakeshore Community Church (1 time), Lakeview Community Church (1 time), Covenant Orthodox Presbyterian Church (1 time), St. Mark's Church (1 time), Our Lady of Mercy (1 time), The Savior's Chapel (1 time), Aldersgate United Methodist Church (1 time), and Baha'i Assembly of Greece (1 time). (Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 32). Additionally during this period, Chikowsky delivered prayers on two occasions, and Zarpentine delivered a prayer on one occasion. (*Id.*).

Neither Sofia, Wagoner, nor Fiannaca has ever attended a Town Board meeting or heard a prayer delivered by any of the individuals whom they invited to deliver invocations. There is no evidence in the record that Sofia, Wagoner, or Fiannaca have any religious affiliation or beliefs, or that they hold any views concerning the religious groups discussed in this Decision and Order.

As for the geographic location of the various religious groups discussed in this action, Plaintiffs have submitted an exhibit, consisting of a "Google Earth" map, which purports to show the "locations of certain religious institutions in and around the Town of Greece." Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 22, Tievsky Aff. ¶ 4. The map[16] shows that the vast majority of religious organizations on the Town's prayer lists are located within the Town of Greece. The map does not show any Jewish synagogues, Churches of Jesus Christ of Latter Day Saints, or Baha'i faith organizations, as being located within the Town of Greece. *Id.*

The map further indicates the presence of "Chua Tanh Tinh Temple of Tranquility," a Buddhist temple, and an unnamed "Jehovah's Witnesses" church,[17] within the Town of Greece, neither of which appeared on the Town's prayer lists. There is no indication that either of these organizations were ever listed in the Community Guide or the Greece Post.

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16 *Id.*, Ex. 80

17 As purported proof that the Town was aware of the Jehovah's Witness congregation, Plaintiffs have submitted an exhibit, indicating that "Ridgeway Congregation of Jehovah Witnesses" applied to the Greece Town Board to have a parcel of land located at 1700 Long Pond Road re-zoned from a general business location to a single-family residential, and for permission to operate a church at the location. (Plaintiff's Appendix to Local Rule 56.1 Statement, Tab 23, Ex. 81). The exhibit indicates that the Town Board reserved decision on the application. *Id.* However, the Court takes judicial notice of the fact that the "Jehovah's Witnesses" church depicted on Plaintiffs' Google Earth map is located several miles north of 1700 Long Pond Road.

The map also purports to show that the following organizations are located *outside* of the Town of Greece: Abundant Life Worship Church, Church of the Ascension Episcopal, Congregation B'Nai Israel, Good News Community Church, Lakeside Presbyterian Church, Morning Star Missionary Baptist, St. George's Episcopal Church, Temple Beth David, Temple Emanu-El, and Wesley United Methodist Church. *Id.* Of these, the only ones that appear on any of the Town's prayer lists[18] are: Good News Community Church, located in Spencerport, and Wesley United Methodist Church, located in the City of Rochester. Wesley United is listed in both the Community Guide and the Greece Post, and Good News is listed in the Greece Post.[19] Although the Abundant Life Worship Center appears on both the Community Guide list and the Greece Post list, and St. George's Episcopal appears in the Greece Post listing, both churches indicate that they are located in the neighboring Town of Hilton, not the Town of Greece.

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18 The map purports to show that a "Morning Star Missionary Baptist" church is located outside of the Town of Greece. Specifically, Plaintiffs' map depicts the Morning Star Missionary Baptist church located at 899 Hudson Avenue, Rochester, N.Y. 14621. However, the organization on the Town's list is Morning Star Christian Fellowship Church, which is listed as having an address within the Town of Greece, at 36 Heritage Woods Court, Rochester, N.Y. 14615.

19 The following religious organizations located outside of Greece appear in either the Community Guide or Greece Post: Abundant Life (Community Guide & Greece Post); Good News Community Church (Community Guide); Lakeside Presbyterian (Greece Post); Wesley United (Community Guide & Greece Post).

Many of the prayers that were given at Board meetings were explicitly Christian, and referred to Jesus or Jesus Christ. Many of the prayers end with the phrase, "in Jesus' name," or similar language. Plaintiffs, who are not Christians, found such prayers offensive and inappropriate. In September 2007, Plaintiffs began complaining to the Town regarding the prayers.

Stephens is an atheist and does not consider herself to be religious. Stephens Deposition at 12. On one occasion, Stephens attended a church service at the request of her cousin, and was offended because the service was "so exclusive. It's . . . aimed at a particular group of people that my values diverge from theirs [sic]." *Id.* at 14. Stephens believes that there is "a strict separation between church and state." *Id.* at 23. Stephens believes that prayers given in the U.S. Congress are inappropriate, because prayers "have no part in the government." *Id.* at 20; *see also*, *id.* at 38: "I personally, what I think the government should be doing is to take the whole question out of government. You know, that's my preference."[20] In that regard, Stephens finds all legislative prayers to be offensive, and finds that "sectarian prayers" are "more offensive than nonsectarian ones." *Id.* at 20. Stephens maintains that sectarian prayers "are not as inclusive as nonsectarian prayers, and we have diversity in the Town of Greece as well as in this country, so [nonsectarian prayers are] more acceptable." *Id.* at 31. Stephens states that her goal in this lawsuit is to stop "certain kinds of prayers," namely

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[20] At the same time, Stephens states, as far as prayer: "I think probably the best thing to do would be to follow the example of what's done in the U.S. Congress, use their guidelines." (*Id.* at 36).

"sectarian" prayers, by which she means "prayers that invoke a particular religion," or "the particulars of a particular religion." *Id.* at 21, 30. Stephens indicates that *non* sectarian prayer "encompasses the three major religions." *Id.* at 39. Stephens initially stated that a prayer containing a reference to Allah would be sectarian, because it evokes a particular religion. *Id.* at 32. Subsequently, though, she stated that she did not know whether such prayer could be nonsectarian. *Id.* at 34-35. Stephens states that a prayer ending with the words "in Jesus's name," or which included the names Jesus, Jesus Christ, or Holy Spirit, would be sectarian. *Id.* at 45, 64-65. However, Stephens states that the terms God, Almighty, Lord God, and Father, are acceptable. *Id.* at 65. It is fair to say that Stephens personally opposes all legislative prayer, but accepts the idea that legislative prayer is lawful if it does not invoke a particular religion. *Id.* at 20-21. Stephens has attended numerous Town Board meetings at which prayers have been given. Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 10, Stephens Aff. ¶ 9.

Galloway also believes that prayer is inappropriate at government meetings. Galloway Dep. at 49 (Stating that she should not "be forced to sit through a meeting-a prayer, a religious prayer when I come for the Town Board meetings"); *see also, id.* at 45 (Stating that prayer "should not be part of our government meeting."). Galloway states that sectarian prayer "is generally specific to one religion, and nonsectarian is more inclusive and I'd like to say universal but, you know, I know not everybody even in a nonsectarian prayer is-you know, is covered, or whatever you want to call it." (*Id.* at 8). She adds, "I believe that [legislative] prayers should be as inclusive as possible, and I also believe that there should

be no reference to-that would be taken as specific to one religion." *Id.* at 18. In that regard, Galloway further states: "I'm asking them to make them [the prayers] nonsectarian so that they are inclusive to the . . . majority of the people, to different faiths. I realize that that will not probably please all [people]." *Id.* at 53. According to Galloway, a nonsectarian prayer is "not specific to necessarily one religion." *Id.* at 9. Galloway believes that a prayer to "Father," "God," and "Lord God" would be nonsectarian. *Id.* at 13, 17, 52. On the other hand, Galloway states that a prayer including the name Jesus would be sectarian, regardless of whether it was uttered by a Catholic, a Protestant, or a Mormon. *Id.* at 19-20. Similarly, Galloway states that a Wiccan prayer using the name "Apollo," or a prayer to polytheistic gods, would be sectarian. *Id.* at 23, 25. Galloway indicates that prayers using the names Jehovah, Allah, Abba Father, and Alpha and Omega are also sectarian. *Id.* at 60, 64. Galloway states that in the context of legislative prayer, if a legislature cannot determine whether a particular term is sectarian or not, it should investigate whether the term is "truly nonsectarian or sectarian." *Id.* at 64. Galloway has attended numerous Town Board meetings at which prayers have been given, including meetings on January 16, 2007, September 18, 2007, October 17, 2007, and July 15, 2008. Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 9, Galloway Aff. ¶¶ 7-8.

On September 18, 2007, Galloway addressed the Town Board and accused it of "promoting the Christian religion." Pl. Stmt. Of Facts ¶ 411. More specifically, Galloway stated:

> I find that it is a promotion of religion when you have preachers come in here and say, 'in Jesus Christ our Lord,' or 'in the Holy Spirit.' . . . Supposedly we are considered a secular country, and thus we should not have a mingling of church and state. . . . I hope this will be addressed because this is not okay to have Christian religion introduced into our town board. There is a separation of church and state and it needs to be kept that way.

Id. On September 24, 2007, Plaintiffs met with Town officials and complained about "the sectarian prayers." *Id.* at ¶ 412. During this meeting, in response to Plaintiffs' question, the Town told Plaintiffs that an Atheist could give the invocation if he or she wanted. Def. Stmt. Of Facts ¶ 12. Plaintiffs allege that Town officials also told them that if they did not like the prayer that was being offered, they could leave the meeting. In October 2007, Galloway again complained about the prayers being "sectarian instead of nonsectarian." Pl. Stmt. Of Facts ¶ 414.

Plaintiffs maintain that most of the prayers offered during the relevant period were "sectarian." Specifically, Plaintiffs contend that, between 1999 and early 2009, 73.6%[21] of the challenged prayers "included sectarian language or references." Pl. Stmt. of Facts ¶ 317.[22] Plaintiffs maintain that dur-

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21 This percentage is suspect in the Court's view, based upon the discussion below, which indicates that some of the allegedly sectarian prayers are indistinguishable from prayers that Plaintiffs contend are nonsectarian.

22 After briefing was completed, Plaintiffs, with the Court's permission, submitted supplemental exhibits, which show that prayers referencing the name of Jesus or Jesus Christ, or praying "in Jesus's name," were also given on the following dates:

ing some years, the prayers were up to 90% sectarian. *Id.* at ¶¶ 318-397. In 2008, the prayers were 58.3% sectarian, according to Plaintiffs. *Id.* at ¶ 398.

Many of the allegedly sectarian prayers are indistinguishable from prayers that Plaintiffs find unobjectionable, except that they end with the phrase, "in Jesus' name," or similar words. Some of the allegedly sectarian prayers do not mention the name of Jesus. In the remainder of this paragraph, the Court will set forth a number of prayers that were given at Town Board meetings, which Plaintiffs maintain are sectarian:

> For our prayer this evening I selected a paraphrase on the psalms. Very important part of your Judeo-Christian heritage, and this is a paraphrase particularly appropriate tonight. It's called the psalm of icy awareness. The earth around my home is now locked in a winter wrap of bone-chilling ice and snow. Water once clear and liquid, a joyous flowing community is now frozen into crystals of ice. Recently in humanity's long history, there has arisen an isolation, a separation of those who share common, human flesh and bone. While once upon a time we gathered joyfully in families, tribes and clans, we now so often live divorced from earth and from each other with loneliness as our only company. All iso-

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May 19, 2009, June 16, 2009, August 18, 2009, September 15, 2009, December 15, 2009, February 16, 2010, March 16, 2010, May 18, 2010, and June 15, 2010. (Pl. Exhibits 619-629). As with the other prayers discussed above, these prayers are essentially indistinguishable from prayers that Plaintiffs characterize as being nonsectarian, except that they close with the words, "in Jesus's name." *Id.*

> lation is ice-olation. Frigid to human flesh, cold and lifeless to the touch, untrue to our most basic unity: Community. And whenever I act singlehandedly apart from an awareness of my sisters and brothers, I become a deformed disciple, tribeless, O God. How can I tread the path which you perfectly made, fully alive Adam. It is not good for one to be alone. Help us Lord in this time that we spend this night, this cold winter night, help us to learn the interrelationship we have with one another and to be strengthened in our ties to one another that we might build up our community and your kingdom. We make this prayer with confidence in your love for us. Amen.

Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 33, Ex. 515, (1/18/00 prayer by Rev. Edward Palumbos); *Id.* Tab 32, Exhibit 500.

> So this evening let's just for a moment, very quietly and peacefully, place ourselves in the presence of God, who dwells within us. Blessed are you Lord, God of all creation, whose goodness fills our hearts with joy. Blessed are you who have brought us together this day to work in harmony and peace. Strengthen us with your grace and wisdom, for you are God forever and ever. May the Lord bless you and keep you. May his face shine upon you and be gracious to you. May he look upon you with kindness and give you his peace. Amen.

Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 33, Ex. 520, (6/20/00 prayer by Fr. Frank Falletta); *Id.* Tab 32, Exhibit 500.

> Heavenly Father, you guide and govern everything with order and love. Look upon this assembly of our town leaders and fill them with the spirit of their wisdom. May they always act in accordance with your will, and may their decision be for the well being of all. The Lord bless you and keep you. The Lord let his face shine upon you and be gracious to you. The Lord look upon you kindly and give you peace. Amen.

Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 33, Ex. 571 (11/16/04 prayer by Fr. Frank Falletta); *Id.* Tab 32, Exhibit 500.

> From Psalm 127: 'If the Lord does not build the house, in vain do its builders labor. If the Lord does not watch over the city, in vain does the watchman keep vigil. In vain is your earlier rising; your going later to rest. You who toil for the bread you eat, when he pours gifts on his beloved while they slumber.' O God of justice and mercy, be so [bestow] your gracious blessings upon the members of this town board and upon all who are gathered here. Help the deliberations of this evening to be without contentiousness or any spirit of partisanship, but directed for what is good for all the residents of this town. Help us to plan well, to execute diligently and to bring to fruition the hopes that we have for the future. O God bestow your blessing upon us, upon our families, and upon all who will benefit from the activities of this evening's meeting. Amen.

Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 33, Ex. 590 (3/20/07 prayer by Fr. John Forni); *Id.* Tab 32, Exhibit 500.

> May the glory of the Lord be forever. May the Lord find delight in his works. May the name of the Lord be blessed from now on to eternity from the rising sun to its setting, and the name of the Lord is praised. The Lord is high above all nations. His glory transcends the heavens. O Lord your name is forever. Your remembrance Lord is throughout all generations. The Lord has established his throne in the heavens and his kingship has dominion over all. The heavens will rejoice, the earth will exalt, and among the nations they will proclaim, 'The Lord reigns. The Lord was king, the Lord is king, and the Lord shall be king forever and ever. The Lord reigns for all eternity.' Amen.

Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 33, Ex. 603 (7/15/08 prayer by Jewish layman Dave Chikovsky); *Id.* Tab 32, Exhibit 500.

> O thou kind Lord, this gathering is turning to Thee, these hearts are radiant with Thy love . . . . Thou art mighty, Thou art powerful, Thou art the giver, and Thou art the ever bounteous. Alláh-u-Abhá.

Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 33, Ex. 614 (12/16/08 prayer by Thomas Lynch of Baha'i Community of Greece); *Id.* Tab 32, Exhibit 500. Again, Plaintiffs maintain that all of the foregoing prayers are *sectarian.* Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 32. In that regard, Plaintiffs contend that these prayers are sectarian

even though they do not mention the name of Jesus. Pl. Appx. to Rule 56.1 Stmt., Tab 32.

On the other hand, Plaintiffs maintain that some of the prayers offered at Town Board meetings were non-sectarian. For example, Plaintiffs contend that the following prayers are *not* sectarian:

> Good evening, [indistinct] bow your heads[23] with me? . . . I pray it would be with the wisdom of God, that you would lead and direct the course of affairs tonight, and that much would be accomplished, that your will would be done, and that your kingdom would be established in this community on earth as it is in heaven. We pray these things in your name, Amen.

Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 33, Ex. 547 (9/17/02 prayer by Pastor Doug Morgante); *Id.* Tab 32, Exhibit 500.

> Let us join our hearts and minds together in prayer. Lord as we are here to make decisions, Lord we call on your wisdom, your care for us, Lord we ask that all decisions that are made this evening are made to your honor and glory, and may your name be praised. And Lord we just thank you for the oppor-

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[23] Plaintiffs indicate that a request to "bow your heads" is not sectarian. However, Plaintiff Stephens nevertheless finds such a request offensive and inappropriate. (Second Supplemental Stephens Declaration, Plaintiffs Appendix to Local Rule 56.1 Statement, Tab 40, Ex. 487, ¶ 5; ¶ 9 "[I]nstructing the audience to bow for the prayer placed me in the uncomfortable position either of drawing attention to myself as a non-Christian by declining to bow and participate in the prayer, or of contravening my own beliefs about religion by participating in a prayer to Jesus.")

> tunity we have to gather together, but also the opportunity and also the responsibility that you've given us tonight, just make those decisions on behalf of the people of Greece. We pray this in our precious Lord's name, amen.

Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 33, Ex. 579 (11/17/05 prayer by Pastor Timothy Bush); *Id.* Tab 32, Exhibit 500.

> God of all creation whose power is greater than ourselves. We pray this evening for the members of our town board who are entrusted with governance, welfare and common good of our citizens. May the work of their hands be blessed. Send the spirit of wisdom and right judgment upon them as they discuss, deliberate, listen and make decisions. As their constant companion, may their service to the citizens of the Town of Greece further the cause of harmony, peace and justice. Amen.

Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 33, Ex. 604 (8/19/08 prayer by Pastor John Firbo); *Id.* Tab 32, Exhibit 500.

> Now I'd invite you to please rise for the opening prayer of this session this evening. [all stand] We pray God of all heaven and earth, we invoke your care, your guidance and your spirit of life this evening. Guide this assembly of board members in their responsibilities. Guide them with your grace of wisdom. Guide them by your justice. Comfort them in your mercy and protect them with power. Make them prudent in all their judgments.

> Make them steadfast in their work. Keep them patient in all they do. Keep them humble in their successes and joyful in all things. Let us pray. Watch over them O God as they go about their work. Protect them from all things that could come in conflict with serving you with sincerity and love. Keep them ever mindful of their goals. Give them fortitude to accomplish all that they set out to do for your honor and glory, and for the good of the people they serve. May your wisdom and blessings come down upon all gathered here this evening as we raise up our prayer to you who is the God of all goodness and peace. And may God's blessings be upon the Town of Greece, its residents and public service-servants, and may God bless this Town of Greece, and may God bless America forever and ever. Amen.

Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 33, Ex. 610 (7/17/07 prayer by Rev. Tim Brown); *Id.* Tab 32, Exhibit 500. Again, Plaintiffs indicate that the foregoing prayers are non-sectarian. Plaintiffs also maintain that prayers using the following terms and phrases are not sectarian: "Heavenly Father;"[24] "In the company with the blessed Lord, may we see the face of Almighty God;"[25] "Creator and ever-creating God, you have given us the image of a kingdom of Heaven or a kingdom of your realm as the ideal to which our human settlement should

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24 (Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 33, Ex. 510, 8/17/99 prayer by Fr. Falletta; *Id.* Tab 32, Exhibit 500).

25 (Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 33, Ex. 546, 8/20/02 prayer by Father Micky McGrath; *Id.* Tab 32, Exhibit 500).

strive;"[26] and "Gracious sovereign Lord God."[27] Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 32, Exhibit 500.

On February 28, 2008, Plaintiffs commenced the instant action. Plaintiffs allege that the Town violated the Establishment Clause by aligning itself with "a single faith," meaning Christianity. In that regard, the Complaint states:

> The Greece Town Board has a longstanding practice of inviting clergy to open the Board's monthly meetings with a prayer. Over the past four years, every clergymember but one who delivered a "Moment of Prayer" has been Christian. The Board has neither suggested nor required that prayer-givers present inclusive, nonsectarian entreaties. As a result, the vast majority of prayers during the past four years have been explicitly Christian in content.
>
> By sponsoring persistently sectarian-and almost exclusively Christian-prayers, the Town Board has publicly aligned itself with a single faith. In so doing, the Board sends the message to non-Christians that they are unwelcome at Board meetings and that the Board does not represent non-Christian's concerns.

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[26] (Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 33, Ex. 529, 2/209/01 prayer by Rev. Bill Burdick; *Id.* Tab 32, Exhibit 500).

[27] (Plaintiffs' Appendix to Local Rule 56.1 Statement, Tab 33, Ex. 567, 7/209/04 prayer by Rev. Charles Roberts; *Id.* Tab 32, Exhibit 500).

> Making non-Christians second-class citizens in the body politic runs afoul of the United States Constitution. Accordingly, Plaintiffs seek, through the filing of this lawsuit, to ensure that Defendants cease employing sectarian practices in the context of Town Board meetings.

Complaint ¶¶ 1-3. On the other hand, Plaintiffs also object to Chikowsky's "sectarian" Jewish prayer. *Id.* at ¶ 71. Plaintiffs describe the alleged "Establishment Clause Violation" as follows:

> The Establishment Clause of the First Amendment to the U.S. Constitution provides that 'Congress shall make no law respecting an establishment of religion.' The Establishment Clause applies with full force and effect to the acts of local officials under the Fourteenth Amendment[.]
>
> Defendants' practices of favoring Christian clergy and prayers at Town Board meetings have the purpose and effect of promoting, advancing, favoring and endorsing the Christian religion, and have a coercive effect on children present at Town Board meetings.
>
> These practices convey the message that the Christian religion is favored or preferred by the Town over other religions *and over nonreligion.* The practices send the message to adherents of the Christian religion that they are political insiders, and simultaneously send the message to non-Christians that they are political outsiders.

Complaint ¶¶ 77-79 (emphasis added). Plaintiffs allege that Defendants have a policy and practice "of

excluding non-Christians as prayer-givers and of sponsoring sectarian prayers," in violation of the Establishment Clause. *Id.* at ¶ 82. Plaintiffs demand declaratory and injunctive relief, nominal damages, and attorney's fees and costs. *Id.* at ¶¶ 84-87. As for declaratory relief, Plaintiffs seek a declaration that "Defendants' prayer practices violate the U.S. Constitution." *Id.* at ¶ 84. As for injunctive relief, Plaintiffs seek a permanent injunction ordering the Town "to refrain from employing sectarian practices in the context of Town Board meeting prayers." *Id.* at 85.

Following discovery, the parties filed the subject cross-motions for summary judgment. In support of their motion, Plaintiffs contend, first, that they have standing to challenge the Town's practices, since they were exposed to the allegedly unconstitutional practices at Town Board meetings.

Next, Plaintiffs maintain that all sectarian legislative prayer violates the Establishment Clause, and that only "non-sectarian, broadly inclusive prayers are constitutionally permissible." Pl. Memo of Law [# 32-1] at 8.[28] Plaintiffs insist that, "[t]hose [prayers] that use the terminology of, or are otherwise associated with, any particular faith or denomination, are not." *Id.* As to their position, Plaintiffs interpret the U.S. Supreme Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983) ("*Marsh*"), and the court's subsequent decision *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989) ("*Allegheny*"), as mandating that legislative prayer be "nonsectarian." *Id.* at 10. According to

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28 *See also*, Pl. Reply Memo at 3 ("[W]hile aggressively proselytizing may compound a violation, sectarian language alone offends the Establishment Clause because it, by its very nature, associates the government with one faith.")

Plaintiffs, legislative prayer "should be inclusive and ecumenical." *Id.* at 17. Plaintiffs argue that "sectarian language alone offends the Establishment Clause because it, by its very nature, associates the government with one faith." Pl. Reply Memo [# 43] at 3.[29] Plaintiffs maintain that the Town must warn invited clergy that their prayers should be "inclusive" and "omit references to any particular deity." Pl. Memo of Law in Opposition [# 38] at 7-8. Plaintiffs insist that the Town need not inquire into the content of prayers, and can "reasonably assume" that individuals who accept the invitation to offer prayer will make a good-faith effort to comply with the Town's request. *Id.* at 13.

Additionally, Plaintiffs contend that the Town's procedure for selecting clergy is unconstitutional, since it "prefers Christianity over other faiths." Pl. Memo of Law [# 32-1] at 18. Plaintiffs maintain that such preferential treatment was intentional, and that "[t]he Town has systematically excluded minority-faith prayer-givers." Pl. Memo in Opposition [# 38] at 1. In particular, Plaintiffs state that Sofia, Wagoner, and Fiannaca refused to include minority-faith groups on the Town's lists of clergy. Pl. Reply Memo [# 43] at 11 ("[T]here is credible evidence that Sofia, Wagoner, and Fiannaca each used multiple resources to compile the official prayer-giver list, yet consistently and purposefully excluded the minority

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[29] In this regard, Plaintiffs are taking a more aggressive posture than that taken by the American Civil Liberties Union ("ACLU") in the *Pelphrey* case, discussed further below. In that case, the plaintiffs argued that *frequent* sectarian references in legislative prayer violated the Establishment Clause, but *isolated* sectarian references did not. *Pelphrey v. Cobb County, GA*, 448 F. Supp. 2d 1357, 1365 (N.D. Ga. 2006), *aff'd*, 547 F.3d 1263 (11th Cir. 2008).

faiths [listed] in those resources."). Plaintiffs allege that the Town refused to extend invitations to churches that were listed in the Greece Post and Chamber of Commerce Community Guide and "ignored anecdotal information about local minority-faith communities. Pl. Memo in Opposition [# 38] at 15-16. On this point, Plaintiffs contend that the Town excluded those of the Mormon, Jehovah's Witness, Buddhist, and Bahai faiths. Pl. Memo of Law [# 32-1] at 20. Plaintiffs also complain that the Town failed to publicize the fact that citizens are permitted to offer prayers. *Id.* at 23[30] (Stating that the Town has not "done any outreach to add minority faiths to their lists of potential invitees.").

In response, Defendants contend, at the outset, that the claims against Auberger in his official capacity should be dismissed, since they are merely repetitive of the claims against the Town.

Defendants further maintain that Plaintiffs lack standing to challenge the Town's legislative prayer practice, since they did not suffer any injury. In that regard, Defendants state that Plaintiffs were never denied the opportunity to give an invocation, and that merely being exposed to sectarian prayer is not an injury where such prayer does not proselytize or disparage other faiths. Additionally, Defendants contend that Plaintiffs could not be harmed by the exclusion of certain religious congregations from the Town's list, since Plaintiffs were not even aware of

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30 In their Reply papers, Plaintiffs admit that there are issues of fact that preclude summary judgment as to the constitutionality of the Town's selection procedure. Specifically, Plaintiffs state that "whether the omissions were driven by religious animus, rather than carelessness, has been put in dispute by the Town's filings." (Pl. Reply Memo at 7).

such groups until this litigation.[31] Defendants also argue that Plaintiffs lack standing to challenge prayers given at meetings which they did not attend. Finally, Defendants submit that Plaintiffs lack standing because the relief they seek is unconstitutional, since it would require the Town to "become excessively entangled in church doctrine in order to determine if a prayer is sectarian or not." Def. Memo of Law at 9.

Defendants further maintain that sectarian prayer is permissible, pursuant to *Marsh,* if it is not exploited to proselytize, disparage, or advance a particular religion. (Def. Memo of Law at 14, 16). Additionally, Defendants contend that the Town's prayer practice is more inclusive than the one approved in *Marsh,* since it included clergy from many different denominations. Furthermore, Defendants state that the Town's procedure for selecting clergy is constitutional, since the lists were compiled from various sources and included various denominations, and since the persons who compiled the lists never excluded any group based on their beliefs. *Id.* at 18. Defendants further maintain that, even assuming that the three clerks intentionally omitted minority faiths from the prayer list, *the Town* is not liable.[32]

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[31] Def. Memo of Law at 7 ("How can Plaintiffs be offended at the exclusion of non-Christian prayer-givers when they were not even aware that non-Christian organizations even existed within the Town?").

[32] Defendants' Reply Memo [# 44] at 7 ("Plaintiffs claim that these clerical staff have intentionally excluded certain religious organizations from giving the prayers before the Town Board meetings. As erroneous as these claims are factually, they are irrelevant because Plaintiffs did not sue the three clerical staff. They sued the Town and its Supervisor. So they must present evidence that the Town and its Supervisor had a policy, practice

ANALYSIS

Rule 56

Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P 56(c). A party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists. *See, Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). "[T]he movant must make a prima facie showing that the standard for obtaining summary judgment has been satisfied." 11 MOORE'S FEDERAL PRACTICE, § 56.11[1][a] (Matthew Bender 3d ed.). "In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant may satisfy this burden by pointing to an absence of evidence to support an essential element of the nonmoving party's claim." *Gummo v. Village of Depew*, 75 F.3d 98, 107 (2d Cir. 1996) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)), *cert. denied*, 517 U.S. 1190 (1996). Once that burden has been established, the burden shifts to the non-moving party to demonstrate "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). To carry this burden, the non-moving party must present evidence sufficient to support a jury verdict in its favor. *Anderson*, 477

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or custom that discriminated against different religions in the selection of prayer givers. . . . Plaintiffs have offered no evidence that the Defendants were aware of the alleged wrongful actions of the three clerical staff, much less that such actions were adopted as Town policy.").

U.S. at 249. The parties may only carry their respective burdens by producing evidentiary proof in admissible form. FEDR.CIV.P. 56(e). The underlying facts contained in affidavits, attached exhibits, and depositions, must be viewed in the light most favorable to the non-moving party. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Summary judgment is appropriate only where, "after drawing all reasonable inferences in favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor of the non-moving party." *Leon v. Murphy*, 988 F.2d 303, 308 (2d Cir. 1993).

Section 1983

The relevant legal principles governing actions against a municipality under Section 1983 are well settled:

Section 1983 provides, in pertinent part:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . .

42 U.S.C. § 1983. In order to prevail on a claim against a municipality under section 1983 based on acts of a public official, a plaintiff is required to prove: (1) actions taken under color of law; (2) deprivation of a constitutional or statutory right; (3) causation; (4) damages; and (5) that an official pol-

icy of the municipality caused the constitutional injury. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The fifth element-the "official policy" element-can only be satisfied where a plaintiff proves that a "municipal policy of some nature caused a constitutional tort." *Id.* at 691, 98 S.Ct. 2018. "In other words, a municipality may not be found liable simply because one of its employees committed a tort." *Bd. of County Comm'rs v. Brown,* 520 U.S. 397, 405, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).

The Supreme Court has made clear that "a municipality cannot be made liable" under § 1983 for acts of its employees "by application of the doctrine of respondeat superior." *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 478, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); *see also City of St. Louis v. Praprotnik*, 485 U.S. 112, 122, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) ("[G]overnment bodies can act only through some natural persons[; therefore] governments should be held responsible when, and only when, their official policies cause their employees to violate another person's constitutional rights."). "Liability for unauthorized acts is personal; to hold the municipality liable, *Monell* tells us, the agent's actions must implement rather than frustrate the government's policy." *Auriemma v. Rice,* 957 F.2d 397, 400 (7th Cir. 1992). Therefore, a plaintiff must demonstrate that, through its deliberate conduct, the municipality was the "moving force" be-

> hind the alleged injury. *Brown*, 520 U.S. at 404, 117 S.Ct. 1382.

Roe v. City of Waterbury, 542 F.3d 31, 36-37 (2d Cir. 2008). In this regard,

> [t]he plaintiff may establish the existence of a policy or custom in a variety of ways. Generally speaking, the courts have articulated four circumstances in which a municipality may be held liable for the unconstitutional acts of its employees. The plaintiff may establish (1) a formal policy, officially promulgated or adopted by the municipal defendant, *Monell*, 436 U.S. at 690, 98 S.Ct. 2018, or (2) a specific action or decision by an official responsible for establishing final policy with respect to the subject matter, if that action or decision caused the violation of plaintiff's constitutional rights, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 [, 106 S.Ct. 1292, 89 L.Ed.2d 452] (1986) (plurality opinion), or (3) the existence of an unlawful practice by subordinate officials so permanent and well settled as to constitute a "custom or usage" and proof that this practice was so manifest or widespread as to imply the constructive acquiescence of the policy-making officials, *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 130[, 108 S.Ct. 915, 99 L.Ed.2d 107] (1988); *Sorlucco v. New York City Police Dept.*, 971 F.2d 864, 871 (2d Cir. 1992), or (4) the failure of the City to train or supervise its employees in a fashion designed to prevent the violation of plaintiff's rights, if such failure amounts to "deliberate indifference" to the rights of those with whom the

> municipal employees will come into contact.[33] *Gottlieb v. County of Orange*, 84 F.3d 511, 518 (2d Cir. 1996)[.]

White-Ruiz v. City of New York, No. 93CIV.7233 (DLC)(MHD), 1996 WL 603983 at *7 (S.D.N.Y. Oct. 22, 1996) (citation omitted). "The mere assertion that a municipality has such a custom or policy is insufficient in the absence of allegations of fact tending to support, at least circumstantially, such an inference." *Zahra v. Town of Southold*, 48 F.3d 674, 685 (2d Cir. 1995) (citation and internal quotation marks omitted).

The Establishment Clause of the First Amendment to the United States Constitution "prohibits the establishment of a national or state church, but the [Supreme] Court has never construed its mandate to apply only to this most obvious proscription. It has long been accepted that the Establishment

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33 "To prove such deliberate indifference, the plaintiff must show that the need for more or better supervision to protect against constitutional violations was obvious. An obvious need may be demonstrated through proof of repeated complaints of civil rights violations; deliberate indifference may be inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or to forestall further incidents." *Vann v. City of New York*, 72 F.3d 1040, 1049 (2d Cir. 1995) (citations omitted); *see also, Amnesty America v. Town of West Hartford*, 361 F.3d 113, 128 (2d Cir. 2004) ("The operative inquiry is whether the facts suggest that the policymaker's inaction was the result of a 'conscious choice' rather than mere negligence. Thus, plaintiffs' evidence must establish only that a policymaking official had notice of a potentially serious problem of unconstitutional conduct, such that the need for corrective action or supervision was 'obvious,' and the policymaker's failure to investigate or rectify the situation evidences deliberate indifference, rather than mere negligence or bureaucratic inaction.") (citations omitted).

Clause prohibits government from officially preferring one religious denomination over another[.]" *Skoros v. City of New York*, 437 F.3d 1, 16 (2d Cir. 2006) (citations omitted).

With these general legal principles in mind, the Court will proceed to consider the parties' various arguments.

Official-Capacity Claims Against Auberger

As indicated above, Defendants maintain that the claims against Auberger in his official capacity should be dismissed, since they are redundant of the claims against the Town. The Court agrees, since "[c]laims against individual defendants in their official capacities are really claims against the municipality and, thus, are redundant when the municipality is also named as a defendant." *Zachary v. Clinton County, N.Y.*, No. 1:01CV1281 (FJS/DRH), 2003 WL 24197685 at *2 (N.D.N.Y. Jan. 10, 2003) (citation and internal quotations omitted), *aff'd*, 86 Fed. Appx. 451 (2d Cir. 2004). Accordingly, the claims against Auberger in his official capacity are dismissed.

Standing

Defendant maintains that Plaintiffs do not have standing, and that this Court therefore lacks subject-matter jurisdiction. The general legal principles concerning standing are well settled. "Article III of the Constitution limits the judicial power of the United States to the resolution of cases and controversies. U.S. Const. art. III, § 2. This limitation is effectuated through the requirement of standing." *Cooper v. U.S. Postal Service*, 577 F.3d 479, 489 (2d Cir. 2009).

> The "irreducible constitutional minimum of standing," rooted in Article III's case-or-controversy requirement, consists of three el-

> ements: (1) an "injury in fact," by which is meant "an invasion of a legally protected interest"; (2) "a causal connection between the injury and the conduct complained of"; and (3) a likelihood that "the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotation marks omitted). . . . Accordingly, "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents." *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 77, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991).

Fulton v. Goord, 591 F.3d 37, 41 (2d Cir. 2009) (citations omitted). The injury alleged must be "concrete and particularized," meaning that "the injury must affect the plaintiff in a personal and individual way." *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 70 (2d Cir. 2001), *cert. den.*, 534 U.S. 827, 122 S.Ct. 68 (2001).

Recently, the Second Circuit observed that "there is uncertainty concerning how to apply the injury in fact requirement in the Establishment Clause context." *Cooper v. U.S. Postal Service*, 577 F.3d at 490. Generally, in the context of an Establishment Clause challenge to legislative prayer, a plaintiff may establish standing by showing that he attended a meeting where he was exposed to prayer which he found offensive. *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d at 72-74 ("[S]tanding to assert an Establishment Clause claim may rest . . . on the plaintiff's direct exposure to the challenged activity"). A plaintiff may also have standing by virtue of being a municipal taxpayer. *Id.* at 72-74; *Pelphrey v. Cobb County, Ga.*

("*Pelphrey*"), 547 F.3d 1263, 1280 (11th Cir. 2008) ("A municipal taxpayer has standing to challenge a violation of the Establishment Clause by a municipality when the taxpayer is a resident who can establish that tax expenditures were used for the offensive practice.") (citations omitted).

In *Cooper v. U.S. Postal Service*, the plaintiff was offended by a religious display at a contract postal unit ("CPU") operated by a church-related organization. When the plaintiff complained, the CPU operator told the plaintiff that if he was offended by the display, he could use another postal facility. *Id.*, 577 F.3d at 488. The Second Circuit held that such facts were sufficient to establish standing. *Id.* at 491 ("Cooper claims that he was made uncomfortable by direct contact with religious displays that were made a part of his experience using the postal facility nearest his home, and that upon complaint, he was advised to alter his behavior. Under *Sullivan* [*v. Syracuse Housing Auth.*, 962 F.2d 1101 (2d Cir.1992)], these allegations state an injury in fact sufficient to support standing."). In this case, Plaintiffs felt uncomfortable and offended by the allegedly sectarian prayers, and they contend that when they complained, Town officials told them that they could leave the meetings if they did not like the prayers. Pursuant to *Cooper*, the Court finds that these facts suffice to establish standing.[34]

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[34] As discussed earlier, Defendant also contends that Plaintiffs lack standing because the relief they seek would be unconstitutional, since it would require the Court to parse the content of the prayers. The Court will address this argument as part of its analysis of Plaintiffs' claims under *Marsh* and its progeny.

Selection Procedures

Plaintiffs claim as part of this action that the Town intentionally excluded "minority faiths" from delivering prayers. The instant case presents the same issues discussed in *Pelphrey v. Cobb County, GA*, 448 F.Supp.2d 1357 (N.D.Ga.2006), *affirmed*, 547 F.3d 1263 (11th Cir. 2008). The *Pelphrey* case concerned two separate county boards, the Cobb County Board of Commissioners ("Board of Commissioners") and the Cobb County Planning Commission ("Planning Commission"), both of which had a policy of inviting clergy to deliver prayers at the start of meetings. The plaintiffs alleged that both boards' selection procedures violated the Establishment Clause because they favored Christian churches. With regard to the Board of Commissioners, the record indicated that the "administrative specialist" tasked with inviting clergy to deliver prayers used a variety of sources to compile a master list of potential prayer-givers. *Id.* at 1362. The master list was made up primarily of Christian denominations, with a "great diversity in [Christian] denomination and cultural affiliation." *Id.* The administrative specialist had information concerning other "minority faiths," such as a "Jehovah's Witness congregation and a Bahai assembly," but those organizations were not included in the master list. *Id.* at 1362-1363. It was undisputed, though, that the administrative specialist never took "into account the beliefs held by a religious group in deciding whom to include on her Master List." *Id.*

The Planning Commission's selection procedure was different. In that regard, the deputy clerk responsible for inviting clergy to deliver prayers at Planning Commission meetings relied primarily on

the telephone yellow pages, and there was evidence that she had intentionally excluded certain faiths:

> A copy of the phonebook used by Ms. Richardson in 2003-04 shows a dark, straight, continuous, vertical line through the categories listed in the Yellow Pages surrounding "Churches." For example, Chiropractors, Church Furnishings, and Church Supplies & Services, and then Cigar & Cigarette Accessories and Circuit Board Assembly Repairs are crossed out. There is also a similar, somewhat lighter line drawn through a series of listings on the lower lefthand corner of one page in the phonebook, drawn continuously through Churches-Islamic, Churches-Jehovah's Witnesses, Churches-Jewish, and Churches-Latter Day Saints. No similar line is drawn through any other denomination or religious group.

Id. at 1363 (citations to the record omitted). The deputy clerk indicated that she did not recall why those groups were crossed-out. *Id.* at 1363-64. Moreover, none of the crossed-out organizations had ever been invited to deliver a prayer.

In considering whether the county's selection procedures violated the Establishment Clause, the district court in *Pelphrey* began by reciting that section of the Supreme Court's decision in *Marsh* which held that, "Absent proof that the [Christian] chaplain's [sixteen-year period of] reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause." *Id.* at 1370 (citation omitted). The district court continued:

> The [Supreme] Court did not elaborate in *Marsh* on what motive or motives it would find "impermissible." Read in context, however, the "impermissible motive" prohibition seems directed at the conscious selection of a speaker from one denomination or sect for the purpose of promoting or endorsing the beliefs held by that speaker. That is, the Court appeared to deem constitutionally unacceptable the selection and retention of a particular speaker because of that speaker's sectarian affiliation or religious beliefs.
>
> The Court indicated, moreover, that the bar for proving such impermissible motive is quite high. It found the virtually uninterrupted sixteen year tenure of a single Presbyterian minister insufficient to demonstrate any "preference" for a particular faith. Instead, it appeared to envision more pronounced evidence of a legislative purpose to sanction one religious viewpoint as a necessary predicate for declaring a legislature's selection of clergy a violation of the Establishment Clause.

Id. at 1370-71 (citation omitted). Nevertheless, the district court found that this high standard was met with regard to the Planning Commission's selection procedure, since it "appear[ed] . . . that certain faiths were categorically excluded from the list of prospective speakers based on the content of their faith." *Id.* at 1373-74. In reaching its determination, the court noted, *inter alia,* that the "minority faiths" had been crossed out. *Id.* Consequently, the district court found that the Planning Commission's selection procedures violated the Establishment Clause.

On the other hand, the district court found no such violation as to the Board of Commissioners' selection procedures. *Id.* at 1372-73. In that regard, the court noted that the administrative specialist's list was "quite diverse," consisting of "denominationally and culturally heterogeneous Christian organizations," as well as non-Christian organizations. Additionally, there was no evidence that the administrative specialist had excluded any organization from her master list based on religious considerations. *Id.*[35] Significantly, the district court held that the Establishment Clause was not violated merely because some so-called minority faith organizations were excluded from the Board of Commissioner's list:

> Contrary to what Plaintiffs suggest in their papers, "diversity" among the faiths represented at legislative functions has never been the *sine qua non* of constitutional legitimacy. *See Marsh*, 463 U.S. at 793-94, 103 S.Ct. 3330 (rejecting argument that sixteen year tenure of Presbyterian minister was offensive to Establishment Clause); see also Pls.' Br. in Supp. of Mot. for Summ. J. [52] at 17 n.9 ("the current practice does not achieve the diversity required by the Court or claimed by the Defendants"). To be sure, it may lend support to a finding that a particular invocation practice has not crossed the boundaries

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35 The district court also found the administrative specialist's explanation credible. In that regard, although the matter was before the court on a summary judgment motion, the court considered the issue of credibility, because the parties had stipulated to having the district court resolve factual issues. *See, Pelphrey*, 547 F.3d at 1268. There is no such stipulation in the instant case.

> erected by *Marsh* and (insofar as it proscribes the appearance of affiliation) *Allegheny*. But *Marsh*, as the Court reads it, was never intended to serve as a vehicle for challenging selection procedures on the basis of "disparate impact."

Id. at 1371. The Eleventh Circuit affirmed. *Pelphrey*, 547 F.3d at 1281-1282. In doing so, the circuit court observed that, "The 'impermissible motive' standard does not require that all faiths be allowed the opportunity to pray. The standard instead prohibits purposeful discrimination." *Id.*

In the instant case, as previously discussed, Plaintiffs maintain that there are triable issues of fact that preclude summary judgment as to the constitutionality of the Town's selection procedure. Specifically, Plaintiffs state that "whether the omissions were driven by religious animus, rather than carelessness, has been put in dispute by the Town's filings." (Pl. Reply Memo at 7). The Court disagrees. Based on the entire record in this case, there is no evidence that Sofia, Wagoner, or Fiannaca intentionally excluded non-Christians from giving prayers at Town Board meetings. Nor can any reasonable inference be drawn that Sofia, Wagoner, or Fiannaca singled-out non-Christian religious groups for such exclusion.

Plaintiffs insist that "there is credible evidence that *Sofia*, *Wagoner*, *and Fiannaca* each used multiple resources to compile the official prayer-giver lists, yet consistently and purposefully excluded the minority faiths in those resources." (Pl. Reply Memo [# 43] at 11) (emphasis added). That is incorrect. The record indicates that Sofia called all religious organizations listed in the version of the Community

Guide that she used, which is not in evidence, and that she compiled a list of all persons who agreed to give prayers. Therefore, the fact that Sofia's list does not include certain groups does not mean that she excluded them. As for Wagoner, she used Sofia's list and probably the Community Guide as well. Wagoner indicates that she called all of the organizations on the lists that she used, and never excluded anyone based on their religion. Although there were groups listed in the Community Guide which did not give prayers during Wagoner's tenure, there is no proof that they were not asked. Moreover, the vast majority of such groups which did not give prayers were Christian. As for Fiannaca, she used the lists provided to her by Wagoner, which she updated periodically using the Greece Post, a weekly newspaper. Fiannaca randomly called groups on those lists, and never intentionally excluded any group. Moreover, Fiannaca believes that she called everyone on her list at one time or another. Although Fiannaca's cumulative lists did not include some groups that appeared in either the 2006 Community Guide, or the undated version of the Greece Post that is contained in the record, the majority of those groups were Christian. Moreover, neither Sofia, Wagoner, or Fiannaca ever attended a Town Board meeting, and there is no evidence that any of them holds a particular religious belief. In sum, there is no evidentiary proof in admissible form that Sofia, Wagoner, or Fiannaca intentionally excluded non-Christian faiths from offering prayers. To the contrary, the record establishes that Sofia, Wagoner, and Fiannaca were merely attempting to complete a routine task in an efficient manner.[36] Consequently, the Court finds

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[36] Plaintiffs imply that Christianity is a single faith. *See,* e.g.,

that the selection procedures utilized did not violate the Establishment Clause.

Moreover, even assuming *arguendo* that Plaintiffs had established a triable of issue of fact as to whether Sofia, Wagoner, and/or Fiannaca excluded non-Christian faiths based on an impermissible motive, they have not raised a triable issue of fact as to municipal liability. Plaintiffs have not identified any formal policy of the Town to exclude non-Christians from delivering prayers. Nor have Plaintiffs identified a specific action in that regard by a policy-making official. Nor have Plaintiffs alleged or shown that the Town was deliberately indifferent with regard to training or supervising Sofia, Wagoner, or Fiannaca. Consequently, it appears that Plaintiffs' method of establishing municipal liability would be to show "the existence of an unlawful practice by subordinate officials so permanent and well settled as to constitute a "custom or usage" and proof that this practice was so manifest or widespread as to imply the constructive acquiescence of the policy-making officials."[37] *See, City of St. Louis v. Prap-*

Plaintiff's Opposition Memo [# 38] at 15; *see also, id.* at 21 (referring to Christianity as "the Town's preferred faith."). However, while all Christian denominations share a common heritage, they are hardly homogeneous. As the Court in *Pelphrey* recognized, the various Christian organizations are "denominationally and culturally heterogeneous." It is therefore clear that Sofia, Wagoner, and Fiannaca extended invitations to a broad spectrum of religious organizations.

[37] To be clear, the relevant "policy, practice or custom" that Plaintiffs must show is a policy, practice, or custom of excluding "minority faiths" from the lists of potential clergy. *See,* Plaintiff's Memo in Opposition [# 38] at 6 ("[T]he Town drew its prayer-giver lists from public sources (the Greece Post, the Chamber of Commerce directory, and . the Yellow Pages), all

rotnik, 485 U.S. at 127, 130, and *Sorlucco v. New York City Police Dept.*, 971 F.2d at 871. However, Plaintiffs' papers do not expressly discuss or address how the Town is liable for the actions of the clerks, and do not allege a policy, practice, or custom, except in conclusory terms.

Moreover, in order to "constructively acquiesce" to a subordinate's unconstitutional conduct, senior policy-making officials must be aware of the conduct, and consciously choose to ignore it: "Another method of implicating a policymaking official through subordinates' conduct is to show that the policymaker *was aware of a subordinate's unconstitutional actions, and consciously chose to ignore them*, effectively ratifying the actions." *Amnesty America v. Town of West Hartford*, 361 F.3d at 126 (emphasis added, citation omitted); *Rubio v. County of Suffolk*, 328 Fed.Appx. 36, 38 (2d Cir. 2009) ("Although in some cases a supervisor's acquiescence to actions of his subordinates may amount to a 'custom' or 'policy,' in such a case *the subordinates' discriminatory practice must be so manifest* as to imply the constructive acquiescence of senior policy-making officials.") (emphasis added); *Sorlucco v. New York City Police Dept.*, 971 F.2d at 871 ("[B]efore the actions of subordinate city employees can give rise to § 1983 liability, *their discriminatory practice must be so manifest* as to imply the constructive acquiescence of senior policy-making officials.") (emphasis added); *Jeffes v. Barnes*, 208 F.3d 49, 61 (2d Cir. 2000) ("[A] municipal policymaker may be found to have caused subordinate officials' conduct by reason of the policymaker's acquiescence in a longstanding [unconstitutional] practice or cus-

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of which included minority faiths that the Town has systematically excluded or declined to invite.")

tom which constitutes the 'standard operating procedure' of the local governmental entity.") (citation omitted).

In this case, there is no evidence that policymaking Town officials were aware that non-Christian groups were allegedly being excluded. Although Plaintiffs insist that the Town of Greece is "a religiously diverse community,"[38] they were not personally aware of any non-Christian religious groups in the Town of Greece.[39] Moreover, even if various Town officials were aware of non-Christian religious groups, that does not mean that they were aware that Sofia, Wagoner, and Fiannaca were allegedly excluding them from giving prayers. In fact, there is no evidence of such an awareness by Town officials.

Alternatively, Plaintiffs contend that the Town received notice of the alleged "systematic exclusion" when Plaintiffs complained to Town officials. However, when Galloway and Stephens met with Town officials to complain about the prayer practice, they complained about prayer at meetings generally, and more specifically, about the sectarian nature of the prayers. Galloway Dep. at 49-50; Stephens Dep. at

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[38] Pl. Memo [# 32-1] at 19.

[39] In March 2007, the local chapter of the ACLU wrote to the Town's attorney, complaining about the sectarian nature of the prayers. The attorney also suggested that the Town "invite non-Christian [sic] ministers," and conceded that, "*You may have to reach outside the town of Greece to find some of these ministers.*" Plaintiff's Appendix, Tab 20, Forsyth letter (emphasis added). In response, the Town's attorney indicated, *inter alia*, that the Town's selection process involved organizations "within the faith community of the Town of Greece." *Id.* The Court is aware of no authority that would require the Town to invite clergy from other towns to diversify the prayers delivered at Greece Town Board meetings.

52; Galloway Decl. dated Jan. 16, 2009, ¶ 15.[40] There is no indication that Plaintiffs complained that non-Christian religions were being excluded from delivering prayers. *See, id.; see also,* Firkins Dep. at 259-260 (Plaintiffs complained about prayer at Board meetings); McCann Dep. at 27-28 (Plaintiffs complained about prayer generally at Board meetings). Nevertheless, shortly after that meeting, news of Plaintiffs' complaints caused individuals from minority faiths to volunteer to give prayers, and the Town permitted them to do so.[41]

Since Plaintiffs have not come forward with evidence that the Town excluded non-Christians for impermissible reasons, the Town is entitled to summary judgment on Plaintiffs' claim that the Town's selection procedures violated the Establishment Clause.

Sectarian Nature of the Prayers

Plaintiffs maintain that the Town violated the Establishment Clause by permitting individuals to deliver "sectarian" prayers at Board Meetings.

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40 Similarly, the letters sent to the Town by the ACLU and Plaintiffs' counsel in March 2007 and July 2007, respectively, complained primarily about the sectarian nature of the prayers, and did not allege that the Town was intentionally excluding non-Christians from giving prayers. Plaintiff's Appendix, Tab 20, Exhibits 71, 72, 75.

41 Plaintiffs met with McCann and Firkins on September 24, 2007. Significantly, at that meeting McCann and/or Firkins told Plaintiffs that anyone, including Atheists, was welcome to give prayers. On January 15, 2008 and July 15, 2008, Chikowsky, a Jewish layman, delivered prayers. On April 15, 2008, Zarpentine, a Wiccan priestess, delivered a prayer. And on December 16, 2008, Thomas Lynch, a member of the Bahai Faith Assembly, delivered a prayer.

Plaintiffs state, in that regard, that, pursuant to *Marsh* and *Allegheny*, sectarian legislative prayers violate the Establishment Clause *per se*, since they necessarily exploit the prayer opportunity and affiliate the government with a specific faith. Plaintiffs contend that the Town must instruct potential prayer-givers that prayers must be inclusive and nonsectarian. Defendants, on the other hand, contend that courts have no reason to parse the content of prayers, unless it has been shown that the legislative prayers were exploited to proselytize or disparage another faith. Defendants further state that there was no such exploitation in this case.

Any analysis of the constitutionality of legislative prayer necessarily begins with the Supreme Court's decision in *Marsh*, which involved a challenge to the Nebraska state legislature's practice of having the same Presbyterian minister, Reverend Palmer ("Palmer"), deliver prayers "in the Judeo-Christian tradition" at the start of each legislative session over a period of sixteen years. *Marsh*, 103 S.Ct. at 3337. The Court reviewed the long "unique history" of legislative prayer in the United States, and particularly in the United States Congress, and concluded that in general, legislative prayer "presents no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations." *Id.* at 3335-36 (citations omitted). In that regard, the Court wrote:

> The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ev-

er since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.

* * *

[T]he First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer.

* * *

On Sept. 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights, J. of the Sen. 88; J. of the H.R. 121. Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. It has also been followed consistently in most of the states, including Nebraska[.]

* * *

Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress-their actions reveal their intent. An act "passed by the first Congress assembled under the Con-

> stitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning". *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297, 8 S.Ct. 1370, 1377, 32 L.Ed. 239 (1888).
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> * * *
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> In applying the First Amendment to the states through the Fourteenth Amendment, *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), it would be incongruous to interpret that clause as imposing more stringent First Amendment limits on the States than the draftsmen imposed on the Federal Government.
>
> This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged.

Id. at 3333-35 (footnotes omitted). The Court further stated:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of *beliefs* widely held among the people of this country. As Justice Douglas observed, "[w]e are a religious people

> whose institutions presuppose a Supreme Being." *Zorach v. Clauson,* 343 U.S. 306, 313, 72 S.Ct. 679, 683, 96 L.Ed. 954 (1952).

Id. at 3336 (emphasis added).[42] Consequently, it is clear that legislative prayer does not, in and of itself, violate the Establishment Clause.

The Supreme Court in *Marsh* then turned its attention to whether "any [particular] features of the Nebraska practice" violated the Establishment Clause. Specifically, the court looked at three points: "first, that a clergyman of only one denomination-Presbyterian-has been selected for 16 years; second, that the chaplain is paid at public expense; and third, that the prayers are in the Judeo-Christian tradition." *Id.* at 3336-37. The Court found that, "[w]eighed against the historical background, these factors do not serve to invalidate Nebraska's practice." *Id.* at 3337. Significantly, in describing the prayers as being "in the Judeo-Christian tradition," the court included a footnote, stating: "Palmer [the chaplain] characterizes his prayers as "nonsectarian," "Judeo Christian," and with "elements of the American civil religion." Although some of his earlier prayers were often explicitly Christian, Palmer removed all references to Christ after a 1980[43] com-

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42 In making this determination, the court did not apply the test ordinarily used in Establishment Clause cases, set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) ("*Lemon*"). In that regard, it seems clear that legislative prayer would not pass the *Lemon* test.

43 Palmer was hired as chaplain in 1965, therefore it appears that as of 1980, he had been delivering explicitly Christian prayers in the Nebraska legislature over a period of fifteen years, before someone complained and he removed references to Christ. In other words, Palmer delivered explicitly Christian

plaint from a Jewish legislator." *Id.* at 3337, n.14. However, the Court did not indicate that Palmer's prayers were constitutional because they omitted all references to Christ. Nor did the majority indicate that it agreed with Palmer's characterization of his prayers as "nonsectarian."[44] Instead, the Court stated:

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Id. at 3337-38. Significantly in this regard, the Court found that Palmer had not exploited, proselytized, or advanced any one faith, even though, as noted in footnote 40 of this Decision and Order, he had delivered "prayers [that] were often explicitly Christian" over a period of fifteen years. *Id.* at 3337, n. 14.

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prayers during fifteen of the sixteen years that were at issue in the case. The Supreme Court did not seem concerned about that fact in reaching its conclusion that Palmer's prayers did not violate the Establishment Clause.

[44] Justice Brennan in his dissenting opinion indicated only that Palmer's prayers were "relatively 'non-sectarian' in comparison with some other examples," while Justice Stevens, also dissenting, referred to the "clearly sectarian content of some of" Palmer's prayers, one of which he set forth verbatim in his opinion. *Id.* at 3350, n. 38, 3352, n. 2. Therefore, to this Court there appears to be little factual support for the notion, discussed below, that in *Marsh,* the challenged prayers were upheld because they were nonsectarian. To the contrary, the *Marsh* decision indicates that the prayers were largely sectarian.

Six years later, in *Allegheny,* the Supreme Court considered a challenge by the ACLU to the constitutionality of two holiday displays, consisting of a Christian creche and a Jewish menorah, respectively, located on government property. The Court summarized its Establishment Clause holdings as follows:

> In the course of adjudicating specific cases, this Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs. Although the myriad, subtle ways in which Establishment Clause values can be eroded are not susceptible to a single verbal formulation, this Court has attempted to encapsulate the essential precepts of the Establishment Clause. Thus, in *Everson v. Board of Education of Ewing*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), the Court gave this often-repeated summary:
>
> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in

> any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." *Id.*, at 15-16, 67 S.Ct. 504, 67 S.Ct., at 511-512.

Allegheny, 492 U.S. at 591, 109 S.Ct. at 3099-3100 (citations and internal quotation marks omitted); *see also, id.*, 109 S.Ct. at 3101 ("Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community.") (citation and internal quotation marks omitted); *id.* at 3105 ("[T]he Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations.").

The Court in *Allegheny* determined that the creche display violated the Establishment Clause, and that the menorah did not.[45] In that regard, the

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[45] Based on the specific facts presented, the court found that the creche display amounted to an endorsement of the Christian faith, while the menorah was "not an endorsement of reli-

Court found that the creche "endorse[d] Christian doctrine." *Id.* at 3105. On the other hand, the Court found that the menorah display did not violate the Establishment Clause, even though the menorah is a sectarian religious symbol, because it was displayed along with a Christmas tree and a sign saluting "liberty." *Id.* at 3113-16 (plurality) (Stating that "[t]he Christmas tree, unlike the menorah, is not itself a religious symbol.").[46]

As part of the majority's explanation, the Court discussed the dissenting opinion of Justice Kennedy, who argued that the creche display was acceptable, pursuant to *Marsh*. In rejecting that argument, the *Allegheny* majority stated, in pertinent part:

> Indeed, in *Marsh* itself, the Court recognized that not even the "unique history" of legislative prayer, 463 U.S., at 791, 103 S.Ct., at 3336, can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief. *Id.*, at 794-795, 103 S.Ct., at 3337-3338.

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gious faith but simply a recognition of cultural diversity." *Allegheny*, 109 S.Ct. at 3115.

[46] In her concurring opinion, Justice O'Connor agreed that the menorah display did not violate the Establishment Clause, even though it is a "religious and indeed sectarian" symbol. *Id.* at 3123. Justice O'Connor stated that a viewer would not view the menorah, alongside the Christmas tree and sign celebrating liberty, as endorsing religion: "Although the religious and indeed sectarian significance of the menorah is not neutralized by the setting, this particular physical setting changes what viewers may fairly understand to be the purpose of the display-as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Id.* (citations and internal quotation marks omitted).

> The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had "removed all references to Christ." *Id.*, at 793, n. 14, 103 S.Ct., at 3337, n. 14. Thus, *Marsh* plainly does not stand for the sweeping proposition Justice KENNEDY apparently would ascribe to it, namely, that all accepted practices 200 years old and their equivalents are constitutional today.

Id., 109 S.Ct. at 3106.[47] This statement from *Allegheny* is the primary support for Plaintiffs' contention that all legislative prayer must be non-sectarian.

Subsequently, the Supreme Court conducted another Establishment Clause analysis, in *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649 (1992) ("*Lee*"). In pertinent part, *Lee* involved a public middle school graduation ceremony, at which a clergyman delivered an invocation prayer. Prior to the graduation, the school principal gave the invited rabbi a pamphlet entitled 'Guidelines for Civic Occasions,' prepared by the National Conference of Christians and Jews, which "recommended that public prayers at nonsectarian civic ceremonies by composed with 'inclusiveness and sensitivity.'" *Id.*, 112 S.Ct. at 2652. Additionally, the school principal told the rabbi that "the invocation and benediction should be nonsectarian." *Id.* The Court found that the principal's attempt to instruct the rabbi on the content of his prayer was improper, stating that, "[t]hrough these

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[47] The *Allegheny* decision itself is based on the majority's application of *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355 (1984), not *Marsh*. *See, e.g., Allegheny*, 109 S.Ct. at 3117 (Justice O'Connor concurring opinion) ("The constitutionality of the two displays . . turns on how we interpret and apply the holding in *Lynch v. Donnelly* . . . ").

means the principal directed and controlled the content of the prayers." *Id.* at 2656. The Court further stated:

> It is a cornerstone principle of our Establishment Clause jurisprudence that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government," *Engel v. Vitale*, 370 U.S. 421, 425, 82 S.Ct. 1261, 1264, 8 L.Ed.2d 601 (1962), and that is what the school officials attempted to do.
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> * * *
>
> We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. . . . If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.
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> * * *
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> Though the efforts of the school officials in this case to find common ground appear to

> have been a good-faith attempt to recognize the common aspects of religions and not the divisive ones, our precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students. *Engel v. Vitale*, *supra*, 370 U.S., at 425, 82 S.Ct., at 1264. And these same precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.

Id. at 2656-57; *see also, id.* at 2658 ("A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."). Additionally, the Court held that the school's practice of including prayer at graduation was coercive and unconstitutional. In that regard, the Court explained that its determination was not inconsistent with *Marsh*:

> Inherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983). . . . The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important

> for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*.

Id. at 2660.

The foregoing Supreme Court cases establish several principles. First, legislative prayer is acceptable in general, provided that the prayer opportunity is not exploited to proselytize or advance any one, or to disparage any other, faith or belief. Second, unless the prayer opportunity has been so exploited, courts should not "parse" the content of a particular prayer. Third, prayers in the Judeo-Christian tradition are acceptable, although legislative prayers that have the effect of affiliating the government with any one specific faith or belief are improper. Finally, the government may not compose official prayers or dictate the content of prayers.

Since *Marsh* was decided, several circuit courts and district courts have issued opinions concerning legislative prayer. A number of these cases have specifically considered whether legislative prayer must be nonsectarian.

In *Stein v. Plainwell Community Schs.*, 822 F.2d 1406 (6th Cir. 1987) ("Stein"), the Sixth Circuit considered the constitutionality of invocational prayers at high school commencement exercises. As part of its, discussion, the court referred to *Marsh*, as follows:

> In *Marsh v. Chambers*, the Supreme Court, looking primarily to the intent of the framers of the Constitution and historical practice since 1789, *id.* at 786-792, 103 S.Ct. at 3333-36, upheld "nonsectarian," *id.* at 793 n. 14,

> 103 S.Ct. at 3337 n. 14 "nonproselytizing" legislative invocations that do not "symbolically place the government's official seal of approval on one religious view," *id.* at 792, 103 S.Ct. at 3336 (citation omitted). The Court emphasized that "civil" or secularized invocations are used across the country to open legislative, judicial, and administrative sessions of state legislatures, city councils, courts and other public bodies, as well as by private institutions of all kinds. So long as the invocation or benediction on these public occasions does not go beyond "the American civil religion," so long as it preserves the substance of the principle of equal liberty of conscience, no violation of the Establishment Clause occurs under the reasoning of Marsh. *Id.* at 793, n. 14, 103 S.Ct. at 3337 n. 14.

Id. at 1408-1409. Respectfully, though, this description of *Marsh* does not appear to be entirely accurate, as shown by the discussion above and by a review of the *Marsh* decision itself. Most notably, the *Marsh* court did not indicate that legislative invocations had to be nonsectarian. Nor did the court state that invocations must "not go beyond 'the American civil religion.'" To the contrary, the only reference to American civil religion in the *Marsh* decision is in a footnote, setting forth Palmer's own description of his prayers, not the Court's. Nor did the Court in *Marsh* refer to legislative prayers as being "civil or secularized invocations."

In *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998), *cert. den.* 526 U.S. 1039 (1999), the Tenth Circuit upheld a city council's decision to prevent a private citizen from offering a "prayer" at a

meeting, where the "prayer" was really a sarcastic commentary directed against legislative prayer.[48] In pertinent part, the Tenth Circuit stated that under *Marsh*,

> the kind of legislative prayer that will run afoul of the Constitution is one that proselytizes a particular religious tenet or belief, or that aggressively advocates a specific religious creed, or that derogates another religious faith or doctrine. When a legislative invocation strays across this line of proselytization or disparagement, the Establishment Clause condemns it.

Id., 159 F.3d at 1234. In that regard, the court further explained:

> Of course, all prayers "advance" a particular faith or belief in one way or another. The act of praying to a supreme power assumes the existence of that supreme power. Nevertheless, the context of the decision in *Marsh*-in which the Court considered the constitutionality of a Presbyterian minister's "Judeo Christian," "nonsectarian" invocations for the Nebraska Legislature-underscores the conclusion that *the mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause. Rather, what is prohibited by the clause is a more aggressive form of advancement, i.e., proselytization.* *See Marsh*, 463 U.S. at 793 n. 14,

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48 The Tenth Circuit assumed without deciding that the appellant's "prayer" was "an invocational prayer," while noting that the "supposed prayer can perhaps as easily be characterized as political harangue." *Id.* at 1229.

> 794-95, 103 S.Ct. 3330. By using the term "proselytize," the Court indicated that the real danger in this area is effort by the government to convert citizens to particular sectarian views. *See* Websters Third New International Dictionary (Unabridged) 1826 (1986) (defining "proselytize" as "to convert from one religion, belief, opinion, or party to another"). As the Court reiterated in *Lee*, "[I]n the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Lee*, 505 U.S. at 591-92, 112 S.Ct. 2649.

Id., n. 10 (emphasis added). The circuit court noted that legislative prayer may "often" contain Judeo-Christian references:

> The genre approved in *Marsh* is a kind of ecumenical activity that seeks to bind peoples of varying faiths together in a common purpose. That genre, *although often taking the form of invocations that reflect a Judeo-Christian ethic*, typically involves nonsectarian requests for wisdom and solemnity, as well as calls for divine blessing on the work of the legislative body.

Id. at 1234 (emphasis added). The Tenth Circuit held that the city council had properly rejected the appellant's request, since his proposed prayer "aggressively proselytizes for his particular religious views and strongly disparages other religious views." *Id.* at 1235 ("Snyder's claim must fail as a matter of

law because his proposed prayer falls well outside the genre of legislative prayers that the Supreme Court approved in *Marsh*[.] . . . Snyder's prayer aggressively proselytizes for his particular religious views and strongly disparages other religious views.").

In *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 Fed.Appx. 355 (9th Cir.2002) ("*Bacus*"), the Ninth Circuit considered the constitutionality of a school board's practice of beginning public meetings with prayer. The "same individual almost always offered the invocation, always 'in the name of Jesus,' and no individuals of other religions ever gave the invocation." *Id.*, 52 Fed.Appx. at 356-57.[49] The court found that such prayers "did not disparage other religious faiths, and did not proselytize." *Id.* Nevertheless, the court found that such prayers violated the Establishment Clause, purportedly because they "advanced one faith, Christianity, providing it with a special endorsed and privileged status in the school board." *Id.*

In *Wynne v. Town of Great Falls, S.C.*, 376 F.3d 292 (4th Cir. 2004) ("*Wynne*"), the Fourth Circuit considered the constitutionality of a town council's practice of beginning monthly meetings with prayer: Where a member of the council, and often the same member, led the prayer; where the Mayor and council members were all Christians; and where the prayers "'frequently refer[red] to Jesus, Jesus Christ,

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[49] The Ninth Circuit specifically did not address the precise issue before this Court. *Id.* ("[W]e need not decide whether prayers 'in the Name of Jesus' would be a permissible solemnization of a legislature-like body, provided that invocations were, as is traditional in Congress, rotated among leaders of different faiths, sects, and denominations." (citation omitted)).

Christ or Savior.'" *Id.*, 376 F.3d at 294. The court discussed *Marsh* and *Allegheny*, and stated, in pertinent part, "that while *Marsh* may have found that history can affect the constitutionality of *nonsectarian* references to religion by the government, the Court [did not hold] that history can legitimate practices that demonstrate the government's allegiance to a particular sect or creed." *Id.* at 297 (emphasis in original, citation omitted). The court found that under the facts described above, the town council had "improperly 'exploited' a prayer opportunity to advance one religion over others." *Id.* at 298. On this point, the court further stated:

> The prayers challenged here stand in sharp contrast to the prayer held not to constitute an establishment of religion in *Marsh*. In *Marsh*, the approved prayer was characterized as 'nonsectarian' and 'civil'; indeed the chaplain had affirmatively "removed all references to Christ." *Marsh*, 463 U.S. at 793 n. 14, 103 S.Ct. 3330.[50] Here, on the other hand, the prayers sponsored by the Town Council 'frequently' contained references to 'Jesus Christ,' and thus promoted one religion over all others[.]

Id. at 298.[51]

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[50] As discussed above, the chaplain in *Marsh* removed references to Christ during the final year of the sixteen-year period at issue in that case.

[51] As part of its discussion, the court rejected that portion of the *Snyder* decision which held that since "all prayers advance a particular faith or belief in one way or another, *Marsh* must have prohibited only the more aggressive form of advancement, i.e., proselytization," stating that the Tenth Circuit's "premise and conclusion are wrong." *Id.* at 301, n. 6 (citation omitted).

The Fourth Circuit again considered a challenge to legislative prayer in *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005) ("*Simpson*"). In *Simpson*, a county board of supervisors adopted a policy that "invocation[s] must be nonsectarian with elements of the American civil religion and must not be used to proselytize or advance any one faith or belief or to disparage any other faith or belief." *Id.*, 404 F.3d at 278. The county invited leaders of various religions to offer such nonsectarian prayers, and in that regard, the court stated:

> This diversity reflects the Board's requirement that prayers be 'non-sectarian.' . . . As to the effect and/or impact of the invocations, they are brief, benign pronouncement of simple values that are not controversial nor confrontational but for, at most, mention of specific Judeo-Christian references that are nevertheless clearly recognized as symbols of the universal values intended to be conveyed. The County, seeking to avoid the slightest hint of sectarianism, revised its invitation letter to the clergy. The letter now directs clerics to avoid invoking the name of Jesus Christ, a custom to which Christian clergy often had adhered when closing their invocations in the past.

Id. at 279 (citation and internal quotation marks omitted). The plaintiff-appellant, Simpson, a self-described witch, alleged that the county's policy violated the Establishment Clause. The basis of her complaint was that she asked to be added to the list

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In that regard, the Fourth Circuit stated that non-sectarian Judeo-Christian prayers "do *not* advance a *particular* sect or faith." *Id.* (emphasis in original).

of invited clergy, but the county denied her request to be added to the list of clergy, telling her that invocations were limited those "traditionally made to a divinity that is consistent with the Judeo-Christian tradition." *Id.* at 280. The court summarized *Marsh* as standing for the idea that "non-sectarian legislative prayer generally does not violate the Establishment Clause." *Id.* at 282 (citation omitted). Purportedly applying that principle, the court stated that the use of the name Christ was improper, but that the following terms were permissible: "Lord God, our creator"; "giver and sustainer of life"; "the God of Abraham, Isaac and Jacob"; "Heavenly Father"; "Lord our Governor"; and "Lord of Lords, King of Kings, creator of planet Earth and the universe and our own creator." *Id.* at 284.

In *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006) ("*Hinrichs*"), the Seventh Circuit considered an Establishment Clause challenge to the Indiana House of Representative's "practice of opening its proceedings with overtly sectarian prayer, usually Christian." *Id.*, 440 F.3d at 394.[52] The appellant was seeking a stay, pending appeal, of a district court's ruling, which found that the aforementioned policy was unconstitutional, and which permanently enjoined such prayer. *See, id.* at 402 ("The injunction permits prayer so long as it is of a nondenominational nature and does not use Christ's name or title or any other denominational appeal.") (citation omitted). The court began by indicating that *Marsh*, and the cases applying *Marsh*, generally approved only nonsectarian legislative prayer. *Id.* at 399 (*citing, inter alia, Allegheny*); *see also, id.* at 401 ("These cas-

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[52] Invited clergy were asked to "strive for an ecumenical prayer." *Id.* at 395.

es appear to teach the rule that non-sectarian legislative prayer is constitutionally sound, but sectarian appeals, including those of an overtly Christian nature, are not.") (citations omitted). In that regard, the court rejected the idea that "prohibiting clerics from invoking Christ would violate the Free Exercise or Free Speech Clauses of the First Amendment." *Id.* at 402. Consequently, the majority agreed with the district court and denied the stay. *Id.* at 403. One justice dissented, stating that, "[w]hile there is caselaw supporting the proposition that *Marsh* approves of only nonsectarian legislative prayer, there still remain powerful arguments to the contrary, not the least of which is the *Marsh* majority's curious ambiguity on the point." *Id.* at 403. Subsequently, the Seventh Circuit reversed its decision, reversed the district court, and remanded the case with instructions to dismiss for lack of subject matter jurisdiction.[53]

In *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188 (5th Cir. 2006), the Fifth Circuit was faced with an Establishment Clause challenge to a school board's practice of beginning its meetings with prayer. Prayers were offered by board members, school administrators, teachers, students, and clergy, and the sample prayers in the record each "contained a reference to 'Jesus Christ' or 'God' and 'Lord.'" *Id.*, 473 F.3d at 192. The district court permanently en-

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53 *Hinrichs v. Speaker of House of Reps. of Indiana General Assembly*, 506 F.3d 584, 585 (7th Cir. 2007) ("We denied the stay but noted that our decision was based only on a preliminary understanding of the facts surrounding Indiana's practice. *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006) ("*Hinrichs I*"). After briefing, oral argument and supplemental briefing, we now hold that the plaintiffs do not have standing to maintain this action.").

joined the school board from opening its meetings with *any* prayer. *Id.*, 473 F.3d at 193. On appeal, two circuit court panel members found the aforementioned prayer policy unconstitutional and affirmed the injunction in part, though for different reasons, and the third member voted to find that the prayer policy did not violate *Marsh*. More specifically, Judge Barksdale found that the prayers violated *Marsh*[54] because they were sectarian, and therefore advanced Christianity. *See, id.* at 203, n. 2 ("[T]he impermissible advancement of a particular religion is grounded in the Board's refusal to adopt a nonsectarian policy, the prayers' uniformly Christian tenor, and their overtly sectarian, proselytizing references."). Judge Barksdale further faulted the school board for selecting only prayer-givers "who would advance the Christian faith" and for not adopting a non-sectarian prayer policy after the lawsuit was filed. *Id.* at 204. In a concurring opinion, Judge Stewart voted to uphold the injunction, finding that the prayer policy was unconstitutional under *Lemon*. Finally, Judge Clement filed a dissenting opinion, finding that the challenged policy did not violate *Marsh*, since the plaintiff-appellee "failed to demonstrate that the Board exploited the prayer opportunity either to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 211 (citation

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54 Judge Barksdale indicated that, "The challenged prayers in *Marsh* contained no references to Jesus Christ; although the chaplain had made Christian references in the past, they had been removed at the request of a non-Christian legislator." *Id.*, 473 F.3d at 198. However, as discussed above, the prayers at issue in *Marsh* spanned a period of sixteen years, and during most of that time the prayers contained references to Jesus Christ.

and internal quotation marks omitted). On this point, Judge Clement observed:

> If content is determinative, the *Marsh* Court's analysis would be internally conflicted. The content of congressional prayer, referred to by the *Marsh* Court as exemplifying permissible legislative prayer, traditionally has included sectarian references. In addition, Congress continues to permit sectarian invocations, as it has since the practice's inception. FN 1 This practice, which Judge Barksdale's opinion would deem unconstitutional under *Marsh*, has been upheld by the D.C. Circuit. *See Murray v. Buchanan*, 720 F.2d 689, 690 (D.C.Cir. 1983) (en banc) (per curiam); see also *Newdow v. Eagen*, 309 F.Supp.2d 29, 41 (D.D.C. 2004) (holding that congressional prayer remains constitutional under *Marsh*).
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> FN1. There is no doubt that prayers before Congress often contain explicit sectarian references. *See Newdow v. Bush*, 355 F.Supp.2d 265, 285 n. 23 (D.D.C. 2005) (noting that "the legislative prayers at the U.S. Congress are overtly sectarian"); *see also* Steven B. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 Colum. L.Rev.2083, 2104 & n. 118 (1996) (noting that, in the six-year period before 1996, "over two hundred and fifty opening prayers delivered by congressional chaplains have included supplications to Jesus Christ").
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> By relying on congressional prayer as a demonstrative example, the *Marsh* Court en-

> dorsed the understanding that the sectarian nature of the prayer's content does not render it necessarily constitutionally unsound. *Marsh*, 463 U.S. at 794-95, 103 S.Ct. 3330; *see also McCreary County*, 125 S.Ct. at 2733 n. 10 (citing *Marsh* as an example of a permissible prayer whose "manifest purpose was presumably religious"). Indeed, the Court stated that the Founders "did not consider opening prayers as a proselytizing activity or as symbolically placing the government's official seal of approval on one religious view." *Marsh*, 463 U.S. at 792, 103 S.Ct. 3330 (internal quotation omitted). The content of the prayers identified in the stipulations [in this case] does not vary meaningfully from that of the prayers offered in Congress on a day-to-day basis.

Id. at 212-213. Judge Clement further found that the plaintiff had not offered proof that the school board had excluded non-Christian faiths from participating in prayers. *Id.* at 215. In that regard, Judge Clement noted that the school board had indicated its "willingness to allow any viewpoint to be heard at the meetings." *Id.*

In any event, following a rehearing *en banc*, the Fifth Circuit reversed its earlier decision, vacated the district court's judgment, and remanded the case with instructions to dismiss it for lack of standing. *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494 (5th Cir. 2007) (en banc). The school board then adopted a new prayer policy, authorizing the board "to invite and host a rotating roster of Parish clergy

to deliver prayers."[55] The board also drafted a form letter to use when inviting clergy, which stated, in relevant part: "To maintain a spirit of respect and ecumenism, the Board requests only that the prayer opportunity not be exploited as an effort to convert others to the particular faith of the invocation speaker, nor to disparage any faith or belief different than that of the invocation speaker."[56] The policy did not expressly prohibit sectarian prayer or recommend that clergy refrain from using sectarian language. Following the adoption of this policy, a number of invited clergy offered prayers that contained references to Jesus Christ.[57] Subsequently, the Doe Plaintiff re-filed his lawsuit, and established his standing to challenge the school board's policy. In *Doe v. Tangipahoa Parish Sch. Bd.*, 631 F.Supp.2d 823 (E.D. La. 2009) ("*Doe II*"), the district court considered cross-motions for summary judgment on the Establishment Clause claims. The district court set forth its interpretation of *Marsh*, in pertinent part, as follows:

> Fidelity to *Marsh* commands not a content-based approach, or an inquiry into whether prayers are sectarian or nonsectarian at the outset, but, rather, focuses on exploitation of the prayer opportunity and efforts, direct or not, to proselytize; to promote or sell a religion. The Supreme Court in *Marsh* discussed the tenure of the hired chaplain and held "[a]bsent proof that the chaplain's reappointment stemmed from an impermissible motive, . . . long tenure does not in itself con-

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55 *Doe v. Tangipahoa Parish Sch. Bd.*, 631 F.Supp.2d 823, 826 (E.D. La. 2009).

56 *Id.* at 828.

57 *Id.* at 829, n. 6.

> flict with the Establishment Clause." *Marsh*, 463 U.S. at 793-94, 103 S.Ct. 3330. Noting that the prayers were offered in the Judeo-Christian tradition, the Supreme Court refused to examine their content because: ["]The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.["] *Marsh*, 463 U.S. at 794-95, 103 S.Ct. 3330. In other words, in light of the historical background of legislative prayer, *Marsh* teaches us that sectarian references do not inherently violate the Establishment Clause; rather, important factors inform the constitutionality of legislative prayer practice: the identity of the speaker, the selection of the speaker, the method and process of selection, and the nature of the prayers.

Id. at 839-840 (citations omitted). Nevertheless, the district court found that there were triable issues of fact as to whether the school board had exploited the prayer opportunity to advance Christianity. *Id.* at 840. For example, there was some evidence suggesting that the person responsible for inviting clergy had favored Christian clergy over non-Christian clergy, as well as some evidence that board members viewed the invocations as being limited to Christian prayer. *Id.*

In *Turner v. City Council of the City of Fredericksburg, Virginia*, 534 F.3d 352 (4th Cir. 2008), *cert.*

den., 129 S.Ct. 909 (2009), the Fourth Circuit addressed a challenge to a city council's policy "requiring that legislative prayers be nondenominational." *Id.*, 534 F.3d at 353. In that case, the council's prayers were offered only by elected council members, on a rotating basis. *Id.* The plaintiff-appellant, Turner, a minister and elected member of the council, argued that the council's policy violated his First Amendment rights, because his "religious beliefs require[d] him to close his prayers in the name of Jesus Christ." *Id.* at 354. Turner alleged that the Supreme Court's decision in *Lee* prohibited the town council from dictating the content of prayers, but the court disagreed: "We do not read *Lee* as holding that a government cannot require legislative prayers to be nonsectarian. Instead, *Lee* established that government cannot compel students to participate in a religious exercise as part of a school program." *Id.* at 355. The court's opinion, authored by retired Supreme Court Justice O'Connor, further stated:

> Opening prayers need not serve a proselytizing function, and often are an acknowledgment of beliefs widely held among the people of this country. So long as the prayer is not used to advance a particular religion or to disparage another faith or belief, courts ought not to parse the content of a particular prayer.
>
> *We need not decide whether the Establishment Clause compelled the Council to adopt their legislative prayer policy*, because the

> Establishment Clause does not absolutely dictate the form of legislative prayer.[58]

Id. at 356 (emphasis added; citations omitted). Significantly, the circuit court did not state that legislative prayer must be nonsectarian. This fact is significant because the district court below had expressly held that such prayer must be nonsectarian. *See, Turner v. City Council of the City of Fredericksburg, Virginia*, Civil Action No. 3:06CV23, 2006 WL 2375715 at *3-4 (E.D. Va. Aug. 14, 2006) ("The Supreme Court and this circuit require that legislative prayer be nonsectarian."). Rather than affirming the district court's decision on that basis, the circuit court affirmed for reason stated above. Accordingly, the circuit court's decision appears to be a retreat from its earlier ruling in *Simpson*. Significantly, the circuit court's statement that it "need not *decide* whether the Establishment Clause compel[s]" a nonsectarian prayer policy clearly indicates that the issue is unsettled in the Fourth Circuit. (emphasis added).

Subsequently, in *Pelphrey*, as already discussed above, the Eleventh Circuit considered an Establishment Clause challenge to the policies of two county commissions, under which clergy from various religious denominations were invited to give legislative prayers at meetings. Despite the county's policy of inviting a variety of clergy, the great majority of the clergy were Christian. *Id.*, 547 F.3d at 1267. The county did "not compose or censor the

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[58] Plaintiffs in this action insist that under *Marsh*, legislative prayer must be nonsectarian. If so, then this language from *Simpson* is very curious, since the easiest and most obvious thing for the court to have said is that the council's policy, requiring that prayers be nonsectarian, was required by *Marsh*.

prayers," and the prayers actually given "included references to 'Jesus,' 'Allah,' 'God of Abraham, Isaac, and Jacob,' 'Mohammed,' and 'Heavenly Father.'" *Id.*, 547 F.3d at 1266-67. The plaintiffs-appellants "argue[d] that the Establishment Clause permits only nonsectarian prayers for the meetings," but the circuit court disagreed since the defendants had not exploited the prayer opportunity, and since "[w]hether invocations of 'Lord of Lords' or 'the God of Abraham, Isaac, and Mohammed' are 'sectarian' is best left to theologians, not courts of law." *Id.* at 1266-67. With respect to this issue, the court stated, in pertinent part:

> *Marsh*, as informed by *Allegheny* and *Lee*, controls our review of the constitutionality of legislative prayers. The district court concluded that these decisions direct us not to inquire into the content of prayers for "legislative and other deliberative public bodies" unless "the prayer opportunity has been exploited" to advance or disparage a belief, *Marsh*, 463 U.S. at 786, 794, 103 S.Ct. at 3333, 3338, or affiliated the government with a specific faith, *Allegheny*, 492 U.S. at 603, 109 S.Ct. at 3106. We agree.
>
> The taxpayers argue that *Marsh* permits only "nonsectarian" prayers for commission meetings, but their reading is contrary to the command of *Marsh* that courts are not to evaluate the content of the prayers absent evidence of exploitation. The taxpayers rely on the acknowledgment by the Supreme Court in *Marsh* that the chaplain had "removed all references to Christ" after 1980 and offered "nonsectarian" prayers at the

time of the challenge. *Marsh*, 463 U.S. at 793 n. 14, 103 S.Ct. at 3337 n. 14. The Court provided these descriptions of the prayers in a footnote, but the Court never held that the prayers in *Marsh* were constitutional because they were "nonsectarian." *See id.* Nor did the Court define that term. *See id.* To read *Marsh* as allowing only nonsectarian prayers is at odds with the clear directive by the Court that the content of a legislative prayer "is not of concern to judges where . . . there is no indication that the prayer opportunity has been exploited to proselytize or advance any one . . . faith or belief." *Id.* at 794-95, 103 S.Ct. at 3337-38.

The *Marsh* Court considered several factors to determine whether the legislative prayers had been exploited to advance one faith. The Court weighed the chaplain's religious affiliation, his tenure, and the overall nature of his prayers. *Id.* at 792-95, 103 S.Ct. at 3336-38. The "nonsectarian" nature of the chaplain's prayers was one factor in this fact-intensive analysis; it did not form the basis for a bright-line rule.

The taxpayers argue that *Allegheny* requires us to read *Marsh* narrowly to permit only nonsectarian prayer, but they are wrong. *Allegheny* does not require that legislative prayer conform to the model in *Marsh*. *Allegheny* instead reiterates the lesson of *Marsh* that legislative prayers should not "demonstrate a [government] preference for one particular sect or creed . . . ." *See Allegheny*, 492 U.S. at 605, 109 S.Ct. at 3107. When legisla-

tive prayers do not "have the effect of affiliating the government with any one specific faith or belief," *id.* at 603, 109 S.Ct. at 3106 (citation omitted), "it is not for [the court] to embark on a sensitive evaluation or to parse the content of a particular prayer." *Marsh*, 463 U.S. at 795, 103 S.Ct. at 3338.

We would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions, and the taxpayers have been opaque in explaining that standard. Even the individual taxpayers cannot agree on which expressions are "sectarian." Bats, one of the taxpayers, testified that a prohibition of "sectarian" references would preclude the use of "father," "Allah," and "Zoraster" but would allow "God" and "Jehovah." Selman, another taxpayer, testified, "[Y]ou can't say Jesus, . . . Jehovah, . . . [or] Wicca. . " Selman also deemed "lord or father" impermissible.

The taxpayers' counsel fared no better than his clients in providing a consistent and workable definition of sectarian expressions. In the district court, counsel for the taxpayers deemed "Heavenly Father" and "Lord" nonsectarian, even though his clients testified to the contrary. At the hearing for oral arguments before this Court, the taxpayers' counsel asserted two standards to determine when references are impermissibly "sectarian." Counsel for the taxpayers first stated, "It is sectarian when the . . . prayer has the effect of affiliating the government with one specific faith or belief," but he later described

> a reference as "sectarian" when it "invokes the name of a divinity . . . in which only one faith believes."

Counsel had difficulty applying either standard to various religious expressions. When asked, for example, whether "King of kings" was sectarian, he replied, "King of kings may be a tough one. . . . It is arguably a reference to one God . . . . I think it is safe to conclude that it might not be sectarian."

> The difficulty experienced by taxpayers' counsel is a glimpse of what county commissions, city councils, legislatures, and courts would encounter if we adopted the taxpayers' indeterminate standard. As the taxpayers' counsel conceded at oral arguments, "the line is not completely bright between sectarian and nonsectarian." On that score, we are in complete agreement with the taxpayers' counsel.

Id. at 1271-72. The court also summarized the various decisions of the courts of appeal interpreting *Marsh,* and concluded that they do not require legislative prayer to be nonsectarian:

> The taxpayers erroneously contend that several other circuits have read *Marsh* to permit only nonsectarian prayer. A review of the precedents of our sister circuits establishes that they have not reached a consensus on the permissibility of sectarian references in legislative prayers. Two of the circuits read *Marsh* as we do. The remaining four circuits have not reached a decision about sectarian references in legislative prayers.

The Fourth Circuit has not read *Marsh* to bar legislative prayers that contain a variety of religious expressions. In its first decision to address *Marsh*, the Fourth Circuit concluded that the prayers of a city council that contained references to "Jesus Christ" were inconsistent with *Marsh* because the prayers "contain[ed] explicit references to a deity in whose divinity only those of one faith believe." *Wynne v. Town of Great Falls, S.C.*, 376 F.3d 292, 301 (4th Cir. 2004). The court understood *Marsh* and *Allegheny*, as we do, to "teach that a legislative body cannot 'exploit' [a] prayer opportunity to 'affiliate' the Government with one specific faith or belief . . ." *Id.* at 298.

In its second decision, the Fourth Circuit read *Marsh*, as we do, to allow a county to invite clergy from diverse faiths to offer "a wide variety of prayers" at meetings of its governing body. *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 284 (4th Cir. 2005) (Wilkinson, J.). The prayers included "wide and embracive [sic] terms" such as "'Lord God, our creator,' 'giver and sustainer of life,' 'the God of Abraham, Isaac and Jacob,' 'the God of Abraham, of Moses, Jesus, and Mohammad,' 'Heavenly Father,' 'Lord our Governor,' 'mighty God,' 'Lord of Lords, King of Kings, creator of planet Earth and the universe and our own creator.'" *Id.* at 284.[59] The court stated that "a practice would remain constitutionally unremarkable

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59 However, as discussed above the county specifically discouraged clergy from using the name of Jesus Christ.

where 'there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" *Id.* at 283 (*quoting Marsh*, 463 U.S. at 794-95, 103 S.Ct. at 3338). The court distinguished *Wynne* on the ground that the prayers of the city council had been exploitive because their "pervasively and exclusively sectarian nature" had "undermined . . . participation by persons of all faiths in public life." *Id.*

The *Simpson* court praised the County for its practice of prayer being "in many ways more inclusive than that approved by the *Marsh* Court." *Id.* at 285. The County relied on voluntary clergy and "welcome[d] rabbis, imams, priests, pastors, and ministers" who represented "a wide cross-section of the County's religious leaders." *Id.* The court explained that invalidating a practice of prayer more inclusive than that upheld in *Marsh* "would achieve a particularly perverse result"; a cramped reading of *Marsh* "would push localities intent on avoiding litigation to select only one minister from only one faith." *Id.* at 287. That consequence would make "America and its public events more insular and sectarian rather than less so." *Id.*

This year, Justice Sandra Day O'Connor, writing for the Fourth Circuit, read *Marsh* to allow invocations offered during meetings ot a city council. *Turner v. City Council of City of Fredericksburg, Va.*, 534 F.3d 352, 356 (4th Cir. 2008). The city council permitted only nondenominational prayers at its meetings,

and Turner, a member of the council who had not been allowed to offer a sectarian prayer, challenged that policy. *Id.* at 354. The Fourth Circuit upheld the policy and applied the same standard from *Marsh* that we apply today: "So long as the prayer is not used to advance a particular religion or to disparage another faith or belief, courts ought not to 'parse the content of a particular prayer.'" *Id.* at 356 (*quoting Marsh*, 463 U.S. at 795, 103 S.Ct. at 3338). Although it upheld the policy of the council, the Fourth Circuit expressly declined to hold that *Marsh* required a policy of nondenominational prayers: "We need not decide whether the Establishment Clause compelled the Council to adopt their legislative prayer policy, because the Establishment Clause does not absolutely dictate the form of legislative prayer." *Id.* Because the invocations in *Turner*, like the invocations in *Marsh*, "recognized the rich religious heritage of our country in a fashion that was designed to include members of the community, rather than to proselytize[,]" Justice O'Connor wrote that they fell "squarely within the range of conduct permitted by *Marsh* and *Simpson*." *Id.* As the Fourth Circuit recognized, *Marsh* permits a range of prayers to be offered during local, state, or federal legislative meetings. *Id.*

The Tenth Circuit also has stated that *Marsh* does not categorically prohibit prayers that invoke "particular concept[s] of God." *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1233-34, 1234 n. 10 (10th Cir.1998) (en banc). The Tenth Circuit upheld the decision of a city

council to deny a citizen's request to offer a prayer that "aggressively proselytize[d] for his particular religious views and strongly disparage[d] other religious views." *Id.* at 1235. The court read *Marsh* to hold that legislative prayer is unconstitutional "when 'the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" *Id.* at 1233-34 (quoting *Marsh*, 463 U.S. at 794-95, 103 S.Ct. 3330).

Contrary to the taxpayers' argument, the Fifth Circuit, the Seventh Circuit, and the Ninth Circuit have not decided the constitutionality of sectarian references in legislative prayers. The decision of the Fifth Circuit that the taxpayers cite, *Doe v. Tangipahoa Parish School Board (Doe I)*, 473 F.3d 188, 202-05 (5th Cir. 2006), was fractured, with the panel split three ways, and the *en banc* court vacated that decision, granted rehearing, and remanded with instructions to dismiss for lack of standing. *Doe v. Tangipahoa Parish Sch. Bd. (Doe II)*, 494 F.3d 494 (5th Cir. 2007) (*en banc*). Although the Seventh Circuit initially stated that Marsh "hing[ed] on the nonsectarian" nature of the prayers and denied a request for a stay of an injunction against the practice of the Indiana Legislature, *Hinrichs v. Bosma (Hinrichs I)*, 440 F.3d 393, 394-95, 399 (7th Cir. 2006), the Seventh Circuit later reversed that injunction and, like the Fifth Circuit in *Doe II*, remanded with instructions to dismiss for lack of standing. *Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly*

(Hinrichs II), 506 F.3d 584, 585 (7th Cir. 2007). The taxpayers also rely on *Bacus v. Palo Verde Unified School District Board of Education*, 52 Fed.Appx. 355 (9th Cir. 2002) (unpublished opinion), to suggest that the Ninth Circuit has prohibited sectarian references in legislative prayers, but *Bacus* is an unpublished decision that concerned prayers offered only "in the Name of Jesus" at the meetings of a school board. *Id.* at 356. The court stated that it "need not decide whether the prayers 'in the Name of Jesus' would be a permissible solemnization of a legislature-like body, provided that invocations were, as is traditional in Congress, rotated among leaders of different faiths, sects, and denominations." *Id.* As an unpublished opinion, *Bacus* has no precedential effect in the Ninth Circuit. See Ninth Cir. R. 36-3.

The Sixth Circuit stated, in dicta, decades ago that *Marsh* permits only nonsectarian prayers, but that decision involved public school graduations, not legislative bodies. *Stein v. Plainwell Cmty. Sch.*, 822 F.2d 1406, 1409 (6th Cir. 1987). The graduation ceremonies included invocations that "employ[ed] the language of Christian theology and prayer." *Id.* at 1410. The Supreme Court has since rejected the application of Marsh to prayer at public school graduations. *See Lee*, 505 U.S. at 597, 112 S.Ct. at 2660-61.

Contrary to the taxpayers' argument, there is no clear consensus among our sister circuits about sectarian references in legislative prayer, but we read *Marsh*, as the Fourth

> Circuit and the Tenth Circuit do, to forbid judicial scrutiny of the content of prayers absent evidence that the legislative prayers have been exploited to advance or disparage a religion. The taxpayers would have us parse legislative prayers for sectarian references even when the practice of legislative prayers has been far more inclusive than the practice upheld in *Marsh*. We decline this role of "ecclesiastical arbiter," *Marsh*, 463 U.S. at 821, 103 S.Ct. at 3351 (Brennan, J., dissenting), for it "would achieve a particularly perverse result." *Simpson*, 404 F.3d at 287.

Id. at 1272-74.

Thus rejecting the notion that legislative prayer must be nonsectarian, the Eleventh Circuit proceeded to consider whether the prayer practice at issue in *Pelphrey* violated the Establishment Clause. In that regard, the court considered three factors: "the identity of the invocational speakers, the selection procedures employed, and the nature of the prayers." *Pelphrey*, 547 F.3d at 1277. As for the first factor, the court observed that although the invited clergy were "predominantly" Christian, "prayers were also offered by members of the Jewish, Unitarian, and Muslim faiths." *Id.* The court found that this factor did not support an Establishment Clause violation, since the practice was more inclusive of different religious faiths than that approved in *Marsh*. As for the second factor, the nature of the prayers, the court stated that the prayers

> included references from Christianity and other faiths . . . . Most of the references were brief and occurred at the end of each prayer.

> Some prayers included references to "Jesus Christ," but others referenced "Allah," "Mohammed," and the Torah. Prayers included a variety of terms, such as "king of kings and lord of lords," "Heavenly Father," and "God of Abraham, Isaac, and Jacob, God of history, Lord of creation, Lord of love, our Father[.]"

Id. at 1278. On this point, the court found that "[t]he diversity of the religious expressions, in contrast with the prayers in the Judeo-Christian tradition allowed in *Marsh*, supports the finding that the prayers, taken as a whole, did not advance any particular faith." *Id.*

And, with regard to the third factor, the selection process employed, the court, as already discussed, found that the procedures employed by one of the county boards, "the County Commission," were not motivated by an improper motive. *Id.* at 1278. As to this finding, the record indicated that the county employee responsible for inviting clergy to County Commission meetings "compiled the list of potential speakers from various sources and included diverse religious institutions, including a mosque and three synagogues," and "did not exclude religious institutions based on their beliefs." *Id.* Based upon its analysis, the court concluded that the County Commission's policy did not violate the Establishment Clause.[60] On the other hand, the court conceded that there was an issue of fact as to whether the pro-

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60 One member of the *Pelphrey* panel filed a dissenting opinion, arguing that Marsh does not permit legislative prayer at "virtually every government meeting." *Id.*, 547 F.3d at 1282 (Middlebrooks, dissenting). However, he "agree[d] with much of the majority opinion, particularly with respect to the danger of the federal judiciary embarking on the editing of prayer." *Id.*

cedures employed by the other county board, the Planning Commission, were tainted by an improper motive. As to the Planning Commission, there was evidence that the employee responsible for inviting clergy had intentionally excluded certain denominations from her list of potential clergy. *Id.*, 547 F.3d at 1281-1282.

Following *Pelphrey*, two district court cases have considered the constitutionality of legislative prayer practices: *Joyner v. Forsyth County, N.C.*, No. 1:07CV243, 2009 WL 3787754 (M.D.N.C. Nov. 9, 2009) ("*Joyner*") and *Doe v. Indian River Sch. Dist.*, 685 F.Supp.2d 524 (D.Del. 2010) ("*Indian River*"). In *Joyner*, the plaintiffs alleged that a county board of commissioners violated the Establishment Clause by "sponsoring and allowing sectarian prayer" at meetings. *Joyner*, 2009 WL 3787754 at *1. The prayers were given by invited local clergy. Initially, the county had no prayer policy, but it adopted one after the plaintiffs sued. The newly-adopted policy indicated that invited clergy could offer an invocation "according to the dictates of [his or her] conscience," provided that "the prayer opportunity not be exploited as an effort to convert others to the particular faith of the invocational speaker, [or] to disparage any [other faith]," so as to maintain a "spirit of respect and ecumenism." *Id.* at *2. Prayers at board meetings "frequently contained at least one reference to Jesus, Jesus Christ, Christ Savior, or the Trinity." *Id.* at *3. None of the prayers in the court's record "invoked a deity associated with any specific faith other than Christianity." *Id.* The court, interpreting and applying Fourth Circuit law, concluded that there was a "nonsectarian maxim," forbidding sectarian prayer. *Id.* at *6-7. The court further found that

> *Marsh* requires that a divine appeal be wide-ranging, tying its legitimacy to common religious ground. Such prayer should transcend denominational boundaries and appeal broadly to the aspirations of *all citizens.*[61] Prayers consistent with *Marsh* highlight beliefs widely held. They also evoke common and inclusive themes and forswear the forbidding character of sectarian invocations.

Id. at *7 (emphasis added; citations and internal quotation marks omitted). Applying this standard, the court found that the challenged prayers violated the Establishment Clause, because they contained frequent references to Jesus, which prevented them from qualifying as "nonsectarian or civil prayer," and therefore had the effect of promoting Christianity and affiliating the board with "a specific faith or belief." *Id.; see also, id.* at *8 ("[P]rayers given under Defendant's policy do not reflect . . . diversity.").

In *Indian River*, the district court considered an Establishment Clause challenge to a school board's policy of "opening its public meetings with a prayer or moment of silence." *Id.*, 685 F.Supp.2d at 526. Board members were selected, on a rotating basis, to either offer a prayer or a moment of silence at the beginning of each meeting, in accordance "with the freedom of conscience of the individual adult Board member." *Id.* at 529. The board's policy stated that the prayer "shall not be used or exploited to proselytize, advance or convert anyone, or to derogate or oth-

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61 Clearly an impossible goal in this Court's view. As this case illustrates, the aspiration of many citizens is to eliminate legislative prayer entirely.

erwise disparage any particular faith or belief," and further provided:

> Any such prayers may be sectarian or non-sectarian, denominational or non-denominational, in the name of a Supreme Being, Jehovah, Jesus Christ, Buddha, Allah, or any other person or entity, all in accord with the freedom of conscience, speech and religion of the individual Board member, and his or her particular religious heritage.

Id. Pursuant to this policy, some board members gave explicitly Christian prayers, while some members quoted historical figures such as George Washington, Ghandi, and Mark Twain, and others observed a moment of silence. *Id.* at 530. The court, interpreting and applying *Marsh* and its progeny, held that the sectarian nature of many of the prayers did not render them unconstitutional. *Id.* at 541 ("[T]he Court concludes that the fact that Board Members often reference Jesus Christ in their prayers does not render the Board's Pray Policy unconstitutional under *Marsh.*"); *see also, id.* at 542 ("If the Court were to accept Plaintiffs' view, a reference to a particular deity in any prayer offered in a legislative or deliberative body would automatically render the practice unconstitutional. This conclusion cannot be squared with the reasoning in *Marsh.*"). The court continued:

> Moreover, the Court questions whether the mere reference to a deity or religious figure-whether it be "Jesus Christ," "God," "Allah," "Mohammed," or "Yahweh"-necessarily renders a prayer "sectarian." For example, the Fourth Circuit has approved of a county's practice of inviting clergy from diverse faiths

> to offer "a wide variety of prayers" at the meetings of its governing body. Although the county had subsequently directed clergy to omit specific references to Jesus Christ, the Fourth Circuit determined that the prayers given at these meetings-which included references to "wide and embracive [sic] terms" such as "'Lord God, our creator,' 'giver and sustainer of life,' 'the God of Abraham, Isaac and Jacob,' 'the God of Abraham, of Moses, Jesus, and Mohammad,' 'Heavenly Father,' 'Lord our Governor,' 'mighty God,' [and] 'Lord of Lords, King of Kings, creator of planet Earth and the universe and our own creator'"-were constitutional under *Marsh*. [(citing and quoting *Simpson*)] Notably, the Fourth Circuit expressed no disagreement with the lower court's finding that the prayers were "not controversial nor confrontational but for, at most, mention of specific Judeo-Christian references that are nevertheless clearly recognized as symbols of the universal values intended to be conveyed." Similarly, the Eleventh Circuit has explained that the distinction between sectarian and nonsectarian prayers is anything but a bright line. [(citing Pelphrey)]

Id. at 542-43 (footnotes omitted). The court further found that the school board's policy had not been used to proselytize or advance Christianity. *Id.* at 543-44 ("[T]he record before the Court demonstrates that, at most, certain Board Members briefly refer to Jesus Christ by name in concluding their prayers. The Court does not agree that these references, by themselves, constitute 'proselytizing' or the 'advancement' of religion.") (footnote omitted). Conse-

quently, the court found that the school board's policy did not violate the Establishment Clause.

In the instant case, the Court is of course bound by the decisions of the Supreme Court. However, no Supreme Court decision has addressed the precise issues and factual circumstances that are before this Court. Additionally, the Court is not aware of any binding Second Circuit authority that is on point, and the circuit courts which have issued decisions concerning legislative prayer are divided. Nevertheless, the circuit court and district court decisions discussed above are instructive, even though they are not binding on this Court.

It is clear that outcomes in Establishment Clause cases are extremely fact specific. *See, e.g., Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854, 2868-69 (2005) ("[N]o exact formula can dictate a resolution to such fact-intensive cases.") (Breyer, concurring). Here, the Court has considered the particular facts of this case in light of all of the binding and non-binding authority discussed above, and finds that the Town's prayer policy does not violate the Establishment Clause. In making that determination, the Court has considered a number of factors in light of the entire record in this case. For example, at the outset, there is no indication that the Town established its unwritten policy of having prayer before meetings for an improper purpose. That is, the Town did not begin having prayer at meetings in order "to proselytize or advance any one, or to disparage any other, faith or belief." Instead, the record indicates that Auberger initiated the policy of having prayer at meetings because he wanted to continue the prayer tradition that he had observed while a member of the Monroe County Legislature.

The Town's prayer policy, to the extent that one exists, is to invite clergy from all denominations within the Town, without any guidance or restriction on the content of prayers. The Town will also permit anyone who volunteers to give an invocation, including atheists and members of non-Judeo-Christian religions such as Wicca, and has never denied a request by anyone to deliver a prayer. Town clerical employees, who have no stake in the process other than to perform the task assigned to them, have invited clergy from lists published by the Town Chamber of Commerce and local newspaper. The clerical employees indicate that they have endeavored to include all groups listed in those publications. The Town has no control over which religious groups are listed in those publications. Over time the clerical employees have compiled lists of clergy who have agreed to give invocations, and the lists do not reflect all of those who declined an invitation.

The groups listed in the Community Guide and Greece Post are overwhelmingly Christian, which reflects the fact that there are comparatively few non-Christian organizations in the Town. Plaintiffs maintain that the Town intentionally excluded non-Christian groups listed in those publications, but the record does not support such assertion. For example, the only purportedly non-Christian group listed in the Community Guide was the Church of Jesus Christ of Latter-Day Saints,[62] and the reasonable

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[62] Plaintiffs indicate that the Church of Jesus Christ of Latter-Day Saints is a non-Christian denomination, but have offered no evidence to support that claim. The Court observes that, according to what appears to be the official website of The Church of Jesus Christ of Latter-Day Saints, http://www.lds.org/, the church believes in the divinity of Jesus

inference from the record is that this group did not make it onto Sofia's list because it declined her invitation. Significantly, along with the Church of Jesus Christ of Latter-Day Saints, a number of Christian churches listed in the Community Guide were not included on Sofia's list. The only non-Christian group listed in the Greece Post, the Bahai Faith Community, was included on Fiannaca's list, and a representative of the Bahai community gave an invocation on December 16, 2008.

Plaintiffs maintain that the Town intentionally excluded three other minority faiths from giving invocations: A Jehovah's Witness congregation, a Vietnamese Buddhist congregation, and Jewish synagogues located outside the Town. Plaintiffs allege that the Town had constructive notice of the Jehovah's Witness group, because it once applied for a zoning permit. Plaintiffs further state that the Town had constructive notice of the Vietnamese Buddhist group, because a Town official was aware of the group's existence as a result of having driven by its temple. And finally, Plaintiff's insist that the Town had constructive notice of the synagogues, because

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Christ, refers to Jesus Christ as "the Savior" and "the Son of God," and indicates that Jesus Christ founded the Church. Whether the Church of Jesus Christ of Latter-Day Saints is a Christian organization is a question beyond the Court's expertise. *See, Colorado Christian University v. Weaver*, 534 F.3d 1245, 1265 (10th Cir. 2008) ("[T]he definition of who is a 'Christian' can generate an argument in serious circles across the country. Some students at CCU are members of the Church of Jesus Christ of Latter-Day Saints, or "Mormons." Members of the LDS Church stoutly insist that they are Christians, but some Christians, with equal sincerity and sometimes vehemence, say they are not.") But in any event, there is no indication that Sofia, Wagoner, or Fiannaca considered the group to be non-Christian.

Auberger was aware that there were synagogues located outside the Town.[63] *See,* Pl. Memo in Opposition [# 38] at 15 ("Town officials . . . ignored *anecdotal information* about local minority-faith communities.") (emphasis added). The Court disagrees that these points create a reasonable inference that the Town excluded these faiths for religious reasons. Significantly, there is no evidence that Sofia, Wagoner, or Fiannaca was aware of these groups, which were not listed in the Community Guide or Greece Post. Plaintiffs argument in this regard seems disingenuous in any event, since even assuming that these supposedly "disfavored minority" groups had each delivered a prayer, Plaintiffs would no doubt still argue that the Town's selection procedure was unconstitutional, since the vast majority of invited clergy would still have been Christian.[64] In that regard, the ACLU, writing on behalf of Plaintiffs, has already indicated that the Town should invite clergy

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63 Although there is evidence that some of the groups listed in the Community Guide and Greece Post were actually located outside the geographic limits of the Town, there is no indication that Sofia, Wagoner, or Fiannaca was aware of that Fact. Moreover, Fiannaca indicated her belief that she was supposed to invited clergy from religious organizations located in the Town.

64 *See*, Pl. Memo in Opposition [# 38] at 15 ("Four prayers [33%] in 2008 were offered by non-Christians, but all those occurred only because Defendants were facing litigation and not because their prayer practice had genuinely been opened to minority faiths."); *see also, id.* at 17 (Referring to addition of minority faiths to clergy lists as "token gestures," since "the Town continues to act with an impermissible religious motive."); *id.* at 19 ("[W]hile the Town may have now altered its practices, the changes do not alter the basic, discriminatory structure of the system.").

from *outside* the Town to create an acceptable level of diversity. *See*, Footnote 39 above.

The Court has also considered the identities of the prayer-givers and the process that the Town employed in inviting clergy to deliver prayers, and finds that these factors did not have the purpose or effect of proselytizing or advancing any one, or disparaging any other, faith or belief, within the meaning of the Establishment Clause. As discussed above, houses of worship in the Town of Greece are overwhelmingly Christian. At their depositions, Plaintiffs could not identify a single non-Christian house of worship in the Town, despite having lived there for decades. Moreover, the sources that town used to identify and invite clergy to deliver prayers, consisting of the Community Guide and Greece Post, were almost exclusively made up of listings for Christian churches. Notably, there were no synagogues, mosques, or other non-Christian churches listed in either source, with the exception of the Bahai faith, and possibly the Church of Jesus Christ of Latter-Day Saints.[65] And as the Court has already observed, there is no indication that Sofia, Wagoner, or Fiannaca intentionally excluded any non-Christian denomination. Moreover, a wide variety of Christian denominations were invited to deliver prayers, including Assemblies of God, Catholic, Presbyterian, Methodist, Lutheran, Pentecostal, and non-denominational. Additionally, town officials advised Plaintiffs that anyone, including an atheist, was welcome to offer an invocation. Furthermore, after Plaintiffs complained, representatives of the Jewish, Bahai, and Wicca faiths, volunteered to give invocations and were permitted to do so. The Town's willingness to rotate the prayer op-

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65 *See*, Footnote 63.

portunity amongst various denominations, each with their own particular beliefs, belies any attempt to proselytize or advance any one, or to disparage any other, faith or belief.

Lastly, the Court has considered the nature of the prayers, and finds that they did not proselytize or advance any one, or disparage any other, faith or belief. It is undisputed that the vast majority of prayers at issue in this case were offered by Christian clergy, and that many of them contained at least one reference to Jesus Christ. On this point, as the Court noted earlier, many of the prayers end with the phrase, "in Jesus' name," or similar language. Otherwise, though, most of the prayers that Plaintiffs maintain are sectarian are indistinguishable from prayers that they say are non-sectarian. Some of the allegedly sectarian prayers contain no reference to Jesus or any other deity. None of the allegedly sectarian Christian prayers disparaged other religions or attempted to convert anyone.

Plaintiffs maintain that some of the prayers "have been aggressively proselytizing," but they neglect to include any citation to the record so it is unclear which prayers they mean. (Plaintiff's Reply Memo [# 43] at 12).[66] Nevertheless, the Court does

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66 Perhaps Plaintiffs are referring to one occasion when an invited clergyman asked the audience to stand for the prayer. *See*, Pl. Memo in Opposition [# 38] at 9; Pl. Appendix of Exhibits, Ex. 616 (Clergyman asks audience, who had been standing for the Pledge of Allegiance, to again stand for the prayer: "Please let us stand again once more. Let's stand please."). The Court does not consider such a request to be aggressive proselytization. And in any event, as shown above, Plaintiffs characterized two separate prayers as nonsectarian, even though one prayer asked the audience to bow its heads and the other asked the audience to stand.

not view any of the prayers in the record as being either aggressive or proselytizing. The mere fact that prayers may contain a reference to Jesus or another deity does not make them proselytizing. Instead, limited references such as, "in Jesus's name," are, under the facts of this case, "tolerable acknowledgment[s] of beliefs widely held among the people of this country." *Marsh*, 103 S.Ct. at 3336.

Plaintiffs maintain, however, that sectarian legislative prayers necessarily violate the Establishment Clause. In that regard, Plaintiffs contend that prayers may only refer to a "generic God," and must not refer to any particular deity or to any religious belief, such as the Holy Trinity, that is specific to a particular religion or group of religions. Plaintiff's further maintain that to prevent sectarian prayer, the Town must instruct potential prayer-givers to give inclusive ecumenical prayers. The Court disagrees.

It is clear to this Court that *Marsh* does not require that legislative prayer be non-sectarian. To the contrary, *Marsh* upheld the constitutionality of legislative prayer, thereby specifically carving out a unique exception to the *Lemon* test, based primarily if not exclusively on the long history of legislative prayer in Congress, which is often overtly sectarian.[67] *See, Doe v. Tangipahoa Parish Sch. Bd.*, 473

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67 *See*, Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2104 (1996) ("The First Congress enacted legislation providing for chaplains for both the House of Representatives and the Senate. Congressional chaplains have led daily prayers in Congress since that time. And from America's earliest days to the present times, the prayers delivered by these chaplains have been true sacral prayers, and many of them, true Christian prayers. *Indeed*,

F.3d at 213-213 (Clement, J., dissenting) ("The content of congressional prayer, referred to by the *Marsh* Court as exemplifying permissible legislative prayer, traditionally has included sectarian references. In addition, Congress continues to permit sectarian invocations, as it has since the practice's inception."). On this point, the Court takes judicial notice of just two recent prayers given at the beginning of sessions of the United States House of Representatives. On April 15, 2010, the Rev. Clyde Mighells, of Lighthouse Reformed Church, gave the opening prayer in the House, which ended with the words, "It is in the blessed name of our Lord, Jesus Christ, that we lay these requests at Your feet. Amen." 156 CONG. REC. H2581 (daily ed. April 15, 2010). And on June 30, 2010, the Rev. Robert Henderson, of First Baptist Church, Lincoln, Illinois, offered the opening prayer in the House, which ended with the words, "These things we pray in the name of our Lord Jesus Christ. Amen." 156 CONG. REC. H5205 (daily ed. June 30, 2010).[68] These prayers are indistinguishable from some of those being challenged in this case,

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within the last six years alone, over two hundred and fifty opening prayers delivered by congressional chaplains have included supplications to Jesus Christ.") (emphasis added).

[68] Reverend Henderson and Reverend Mighells were both Guest Chaplains, who gave their invocations under the sponsorship of particular Members of the House. The official chaplain of the House of Representatives, the Rev. Daniel P. Coughlin, maintains a website for the Office of the Chaplain of the House, which states, in pertinent part: "One of the special privileges and great joys of being House Chaplain is to welcome guest chaplains who have been recommended by the Members of Congress. This is a wonderful opportunity to affirm pastoral leaders from many different backgrounds. This practice manifests the freedom of worship enjoyed across this nation." *See*, http://chaplain.house.gov/chaplaincy/guest_chaplains.html

and according to *Marsh*, "it would be incongruous to interpret [the Establishment Clause] as imposing more stringent First Amendment limits on the States than the draftsmen imposed on the Federal Government." *Marsh*, 103 S.Ct. at 3335.

The Supreme Court's decision in *Allegheny* does not compel a contrary ruling. As already mentioned, the majority decision in *Allegheny* stated that, "The legislative prayers involved in *Marsh* did not violate [the Establishment Clause] because the particular chaplain had removed all references to Christ." *Allegheny*, 109 S.Ct. at 3106 (citation and internal quotation marks omitted). That statement is binding on this Court. Nevertheless, the statement does not indicate that legislative prayers must be nonsectarian. The facts of *Marsh* were, of course, that a single clergyman of a single Christian denomination had been the chaplain of the Nebraska legislature for sixteen years. Under those facts, the Supreme Court may have found it significant, in denying the Establishment Clause challenge, that the chaplain had deleted all references to Christ, albeit belatedly, because otherwise it might have appeared that Nebraska was advancing a particular faith. In this case, though, the facts are entirely different, since the Town has rotated the prayer opportunity amongst numerous clergy of a variety of denominations. Where, as here, a legislature permits a variety of clergy to give invocations, there is arguably less likelihood that the government could be viewed as advancing a particular religion, and therefore less concern over the sectarian nature of particular prayers. In any event, under *Marsh*, the issue is not whether the prayer is sectarian or non-sectarian, but whether, based on the totality of the circumstances, the prayer is being ex-

ploited to advance or disparage a belief, or to associate the government with a particular religion.

The Court also disagrees with Plaintiffs' contention that the Town must, or even can, instruct potential prayer-givers that prayers should be "inclusive and ecumenical."[69] In *Lee*, the Supreme Court characterized the defendant school's similar instruction to an invited rabbi as an impermissible attempt by government to control the content of prayer. *Lee*, 112 S.Ct. at 2656; *see also*, *id.* at 2658 ("A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."). The Court finds that the policy requested by Plaintiffs would violate *Lee*, since it would likewise impose a state-created orthodoxy. In this regard, the Court respectfully disagrees with the Fourth Circuit's decision in *Turner*.

Moreover, the Court finds that Plaintiff's proposed non-sectarian policy, which would require Town officials to differentiate between sectarian prayers and nonsectarian prayers, is vague and unworkable, as *Pelphrey* demonstrates. The instant case illustrates the illusory nature of so-called non-sectarian prayer, since as shown above, many of the

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69 Plaintiffs indicate that Town officials should "ask invited clergy to keep the prayers ecumenical and inclusive or Christians and non-Christians alike," and that the officials could then "reasonably assume that clergy who accept an invitation to deliver a nonsectarian prayer will make a good-faith effort to comply with the terms of the invitation, and no pre-screening of the prayer would be needed." Pl. Memo in Opposition [# 38] at 13. Plaintiffs thus indicate that the non-sectarian requirement is a condition or term of the invitation.

prayers that Plaintiffs say are sectarian are indistinguishable from prayers that they say are not.

Considering all of these factors, and in light of the undisputed facts of this case, the Court finds as a matter of law that the Town did not violate the Establishment Clause.

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment [# 33] is granted, Plaintiffs' motion for summary judgment [# 32] is denied, and this action is dismissed.

SO ORDERED.

Dated: Rochester, New York
August 5, 2010

Enter:

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 8th day of August, two thousand twelve,

Susan Galloway,
Linda Stephens,
Plaintiffs - Appellants,

v.

Town of Greece,
Defendant - Appellee

John Auberger, in his official capacity as Town of Greece Supervisor,
Defendant.

ORDER

Docket Number: 10-3635

Appellee, Town of Greece, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
APR 8 - 2013
OFFICE OF THE CLERK

No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Town Board in Greece, New York, opens its monthly meetings with clergy-led prayer. With the exception of a four-meeting hiatus around the time of the filing of this lawsuit in 2008, the Town has relied exclusively on Christian clergy, who have persistently delivered overtly Christian prayers. Many of the prayer-givers have elaborated on Christian tenets and celebrated the birth and resurrection of Jesus Christ; one asked attendees to recite the Lord's Prayer in unison; and another criticized objectors to the prayer practice as an "ignorant" "minority."

Clergy request that attendees join in the prayers. Town Board members participate by bowing their heads, standing, responding "Amen," or making the sign of the cross. Members of the audience do the same. At the conclusion of the prayer, the Town's Supervisor typically thanks the prayer-giver for serving as the Town's "chaplain of the month," though he did not bestow this title on the few non-Christians who delivered the prayer in 2008. Many members of the audience are required to attend the meetings; children also routinely attend to fulfill a high-school civics requirement.

The question presented by the petition is whether the Second Circuit correctly concluded, under *Marsh* v. *Chambers*, 463 U.S. 783 (1983), that the Town Board exploited its prayer opportunity to advance one faith to the exclusion of others.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

INTRODUCTION

The decision that petitioner asks this Court to review is not one that the Second Circuit actually issued. According to petitioner, "[t]he Second Circuit held that legislative prayer practices can be unconstitutional * * * simply because the prayers (and prayer-givers) disproportionately use explicitly Christian references." Pet. 15. What the Second Circuit in fact did was to review "the totality of the circumstances," rather than "any single aspect of the town's prayer practice," to conclude that the practice, "viewed in its entirety," had "advance[d] a single religious sect." Pet. App. 14a, 19a.

Unhappy with this outcome, petitioner argues that the differing results in the circuits' legislative-prayer cases flow from disparate legal standards that emanate from a "perceived conflict" in this Court's decisions. Pet. 19. But no circuit has recognized a conflict in this Court's jurisprudence, and none of the cases that petitioner cites applied a standard that conflicts with the Second Circuit's analysis. The differing outcomes in the circuits' decisions have stemmed from factual differences among the cases, not from the application of divergent legal tests. Although the Ninth Circuit's decision in *Rubin* v. *City of Lancaster*, __ F.3d __, No. 11-56318, 2013 WL 1198095 (9th Cir. Mar. 26, 2013), issued after the filing of the petition, can be read to create a narrow circuit split with respect to a single aspect of the *Marsh* test, that split has no bearing on the outcome here.

Petitioner's limited-public-forum argument was

neither pressed nor passed upon below, and it conflicts with the unanimous rulings of the circuit courts.

Nor does the decision below implicate the practices of state legislatures or the United States Congress, which are wholly distinct from the one here.

Finally, even if this case might otherwise warrant the Court's attention, review would be premature because the district court has yet to fashion a remedy.

STATEMENT

I. Factual Background

The Greece Town Board meets monthly to vote on proposed ordinances, obtain residents' input, bestow citizenship awards, swear in new Town employees, and otherwise conduct the Town's public business. Pet. App. 3a. Historically, Board meetings commenced with a moment of silence. *Ibid.* In 1999, however, the Town began asking local clergy to open meetings with prayer. *Ibid.*

1. *The Town's overwhelmingly Christian prayer-givers.* From 1999 through 2007, Christian prayer-givers delivered every one of the Town's monthly prayers. Pet. App. 4a. After respondents complained about the prayer practice—and for the first (and only) time in the history of the Town's prayer practice—the Town scheduled three non-Christians to deliver prayers at four of twelve Board meetings in 2008, the year in which this lawsuit was filed. Pet. App. 4a-5a. After that, however, no non-Christian returned to the podium: during the eighteen-month period preceding the record's closure, the Board's prayer-givers were, once again, 100% Christian clergy. Pet. App. 5a.

Indeed, the Town's line-up has been so lacking in religious diversity that, at his deposition, the Town's Supervisor, John Auberger, could not recall a single non-Christian's having ever delivered the prayer. C.A. App. 800.

2. *The Town's overwhelmingly Christian prayers.* Roughly 130 invocations were offered from January 1999 through June 2010, and the transcripts and videos of more than 120 of these are in the record. Pet. App. 6a. During the nine-year period from the inception of the Town's prayer practice to the eve of the filing of this lawsuit—a period involving exclusively Christian prayer-givers (Pet. App. 4a)—over two-thirds of the prayers included Christian language, and no other religious traditions were referenced. Appellants' C.A. Br. 8 & n.4 (citing transcripts). Even in 2008, the only year in which non-Christians delivered prayers, a majority of the prayers contained distinctly Christian content. See *id.* at 8-9 (citing transcripts). And from 2009 until the record closed—an eighteen-month period once again limited to Christian prayer-givers—approximately *90% of the prayers were overtly Christian*. See *id.* at 9 (citing transcripts) (emphasis added).

These numbers do not rest on subtle interpretations of content. All the prayers identified as Christian included references to "Jesus," "Jesus Christ," "Your Son," or the "Holy Spirit." Pet. App. 7a; Appellants' C.A. Br. 9 n.6. Many went much further, elaborating on Christian tenets or celebrating Christ's resurrection. Pet. App. 7a. One prayer-giver asserted that God shows the extent of his kindness "in the life and death, resurrection and ascension of the Savior

Jesus Christ" (C.A. App. 1078); another cited "the saving sacrifice of Jesus Christ on the cross" (C.A. App. 668); and a third spoke of the coming of Spring as "an expressive symbol of the new life of the risen Christ" (C.A. App. 1098). Prayer-givers have used the opportunity to invite Board members to church events, and a Board member has himself used the time to praise such an event. See C.A. App. 619, 639, 661. One prayer-giver called on attendees to join together in reciting the Lord's Prayer (C.A. App. 629); another said that he would like to solicit contributions for his church (Pet. App. 21a-22a n.7); and a third criticized objectors to the prayer practice as an "ignorant" "minority" (Pet. App. 8a).

3. *Other factors further align the Town with Christianity.* Prayer-givers are summoned to the podium by Supervisor Auberger, who announces each clergymember's religious affiliation by stating the name of his or her house of worship—an affiliation that is also memorialized in the minutes and agendas. Pet. App. 3a-4a; *e.g.*, C.A. App. 341-446, 469-570, 599-709; see also C.A. App. 791. When Auberger has a special relationship with a pastor, he makes that plain as well. See C.A. App. 682 (introducing Father Falletta as "my pastor, and also the pastor of Councilman Antelli's"); see also C.A. App. 615, 623, 666.

Prayer-givers stand behind a podium adorned with the Town's official seal, and deliver the prayers over the Town's public-address system. Pet. App. 3a; C.A. App. 30, 49-50. They typically begin with a request for attendees to join in the prayer. Pet. App. 3a. Members of the Board participate by bowing their heads, standing, responding "Amen," or making the sign of the

cross. Pet. App. 6a, 23a. The audience does the same. Pet. App. 6a.

At the conclusion of the prayer, Supervisor Auberger typically thanks the prayer-giver for serving as the Town's "chaplain of the month," and has, at times, presented the prayer-giver with a commemorative plaque to that effect. Pet. App. 4a. Unlike the Christian clergy, however, the three non-Christians who prayed in 2008 were not bestowed with this title. C.A. App. 692, 695, 698, 709.

For many members of the audience, attendance at Town Board meetings is not optional. Police officers, for example, must attend to be sworn in to office. Pet. App. 3a; C.A. App. 780-781. Attending meetings is a job requirement for various Town employees. C.A. App. 863. Any resident seeking a zoning variance must likewise attend. C.A. App. 788. And meetings provide the only opportunity for community members to address the collective Board about pending issues. C.A. App. 779. Children also routinely attend meetings to lead the Pledge of Allegiance, receive awards, and fulfill a state-mandated civics requirement that is a condition of high-school graduation. Pet. App. 3a; *e.g.*, C.A. App. 294, 345, 355, 366, 383, 401, 411; see also C.A. App. 779.

II. Proceedings Below

Respondents are long-time residents who regularly attend Board meetings. Pet. App. 5a, 7a-8a. Susan Galloway is Jewish, and Linda Stephens is an atheist; both felt marginalized by the Town's legislative-prayer practice. C.A. App. 189a-190a, 195a-196a. Accordingly, in September 2007, they complained to Town officials.

Pet. App. 8a. But the Town declined to modify its practice, and the following month's prayer-giver leveled the "ignorant" "minority" accusation. *Ibid.*; C.A. App. 690.

In February 2008, respondents filed suit, alleging that the Town's prayer practice violated the Establishment Clause. Pet. App. 28a-29a. The Town secured as its counsel the Alliance Defending Freedom ("ADF"), a self-identified "Christ-Centered" legal-advocacy organization.[1]

On cross-motions for summary judgment, respondents argued that the Town had violated the Constitution in two ways: (1) the Town intentionally discriminated against non-Christians in selecting prayer-givers; and (2) the Town's prayer practice advanced a single faith in violation of *Marsh* v. *Chambers* (463 U.S. 783 (1983)). See Pet. App. 8a. The district court rejected both claims (Pet. App. 28a-131a), and respondents appealed the ruling on the latter claim (Pet. App. 10a).

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[1] ADF, *Guiding Principles*, http://www.alliancedefendingfreedom.org/about/detail/4205 (last visited Apr. 6, 2013). Petitioner's *amici* are variously represented by the Liberty Institute, "a conservative Christian legal advocacy group" (John Schwartz, *After New York, New Look at Defense of Marriage Act*, N.Y. Times, June 28, 2011, at A12, available at 2011 WLNR 12832730); the Family Research Council, which "advance[s] faith * * * from a Christian worldview" (*About FRC*, http://www.frc.org/about-frc (last visited Apr. 6, 2013)); and Peter Gentala, who previously worked for ADF (see Ariz. State Univ., *Faculty Associate Profile: Peter Gentala*, http://tinyurl.com/petergentala (last visited Apr. 6, 2013)).

After considering the "totality of the circumstances" surrounding the Town's practice (Pet. App. 19a), a unanimous panel of the Second Circuit held that the Town had affiliated itself with a single religion in violation of *Marsh*. Pet. App. 1a-27a.

With respect to the Town's prayer-givers, the court concluded that the Town's rules and procedures undermined the randomness of the selection process and "virtually ensured a Christian viewpoint." Pet. App. 19a. The court found that the Town's litigating position—that it would accept volunteers of any faith, whether clergy or otherwise—was undercut by the Town's failure ever to announce, much less formally enact, an all-comers policy. Pet. App. 20a. The randomness of the selection process was further undermined by the Town's reliance on a "a cadre of recurrent volunteers who were willing to appear frequently to give the invocation." Pet. App. 20a n.5. Consequently, "Christian clergy delivered each and every one of the prayers for the first nine years of the town's prayer practice, and nearly all of the prayers thereafter." Pet. App. 19a.

With respect to the prayers themselves, the court observed that "[w]e need not 'embark on a sensitive evaluation' or 'parse the content of a particular prayer,' * * * to recognize that most of the prayers at issue here contained uniquely Christian references and that prayers devoid of such references almost never employed references unique to some other faith." Pet. App. 20a (quoting *Marsh*, 463 U.S. at 795). Following *Marsh* and other courts of appeals, the Second Circuit held that "[t]he sectarian nature of the prayers * * * was not inherently a problem." Pet. App. 21a. But the

court was troubled that, "despite the homogeneity of viewpoints reflected by the invocations, the town did not explain that it intended the prayers to solemnize Board meetings, rather than to affiliate the town with any particular creed," and did not request that prayer-givers avoid proselytizing or disparaging remarks. Pet. App. 22a. Under those circumstances, the court concluded, "the rare handful of cases, over the course of a decade, in which individuals from other faiths delivered the invocation cannot overcome the impression, created by the steady drumbeat of often specifically sectarian Christian prayers, that the town's prayer practice associated the town with the Christian religion." *Ibid.*

Finally, the court considered the context of the prayers, noting that Board members participate in the prayers by, among other things, making the sign of the cross; that clergy deliver invocations on behalf of the Town and its residents as a whole, rather than on behalf of themselves or the Board; and that prayer-givers request audience participation—all of which "placed audience members who are nonreligious or adherents of non-Christian religion in the awkward position of either participating in prayers invoking beliefs they did not share or appearing to show disrespect for the invocation." Pet. App. 23a.

In sum, the court concluded, the Constitution is transgressed "[w]here the overwhelming predominance of prayers offered are associated, often in an explicitly sectarian way, with a particular creed, and where the town * * * conveys the impression that town officials themselves identify with the sectarian prayers and that residents in attendance are expected to participate

in them." Pet. App. 26a.

The court carefully limited the reach of its decision to the unique circumstances in this case. Pet. App. 19a, 24a. And it underscored that the Town could continue to pray:

> We do not hold that the town may not open its public meetings with a prayer or invocation. Such legislative prayers, as *Marsh* holds and as we have repeatedly noted, do not violate the Establishment Clause.

Pet. App. 25a. The court thus remanded to allow the district court, "with the assistance of the parties, to craft appropriate relief." Pet. App. 27a.

REASONS FOR DENYING THE PETITION

Just one year ago, this Court denied a petition for certiorari in which ADF made arguments virtually identical to the ones it makes here. Compare Pet. Cert. 9-25, *Forsyth Cnty., N.C.* v. *Joyner*, No. 11-546, with Pet. 8-25. The decision below, which joins company with *Joyner*, offers further indication that the Court's involvement is unnecessary.

I. The Alleged Circuit Split Is Illusory.

The Second and Fourth circuits see eye-to-eye with the Eleventh, not only on the operative legal standard for evaluating legislative-prayer practices, but also on the breadth of facts pertinent to the application of that standard. The differing outcomes in these circuits' decisions have stemmed not from a conflict in legal principle, but from factual differences among the cases.

Although a recent ruling of the Ninth Circuit may

be read to create a circuit split regarding one factor of the *Marsh* inquiry, that factor is not outcome-determinative here.

A. The circuits agree that legislative-prayer practices are governed by *Marsh*, not *Lemon*.

Petitioner contends that the circuits are divided over the legal standard governing legislative prayer, arguing that the Eleventh Circuit "has adhered to the *Marsh* test," while the Second and Fourth Circuits have applied an endorsement test "derived directly from *Lemon* [v. *Kurtzman*, 403 U.S. 602 (1971)] and its progeny." Pet. 10, 15.

Not so. The Second Circuit stated unequivocally that "the touchstone of our analysis must be *Marsh*," which "did not employ the three-pronged test the Court had adopted, eleven years earlier, in *Lemon*." Pet. App. 10a, 16a. Thus, the Second Circuit did not ask whether the Town's prayer practice had the primary purpose or effect of advancing religion. Cf. *Lemon*, 403 U.S. at 612-613. Rather, the court evaluated whether the prayer opportunity had been "exploited to proselytize or advance any one, or to disparage any other, faith or belief." Pet. App. 15a (quoting *Marsh*, 463 U.S. at 794-795). The court cited *Lemon* only to eschew its application. Pet. App. 10a-11a.[2]

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[2] Petitioner asserts that the court below "conceded" that the challenged prayers did not contravene *Marsh* when it noted that "[t]he prayers in the record were not offensive in the way identified as problematic in *Marsh*." Pet. 8 (quoting Pet. App. 21a). Read in context, however, the court was simply saying that no

The Second Circuit's reference to "endorsement" and the "reasonable observer" does not mean that the court was applying the *Lemon* or endorsement test in lieu of *Marsh*. Cf. Pet. 12. As the Eleventh Circuit noted, *Marsh* likewise is concerned with "promot[ion] or endors[ement]" (*Pelphrey* v. *Cobb Cnty., Ga.*, 547 F.3d 1263, 1281 (11th Cir. 2008) (quotation marks omitted)), but it prohibits legislative-prayer practices that have the effect of advancing or endorsing *a single faith* (*Marsh*, 463 U.S. at 793-795), whereas *Lemon* and the endorsement test prohibit governmental action that endorses even "religion generally" (*Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 8 (1989)). Here, it is clear that the Second Circuit asked the question dictated by *Marsh*, not the one called for by *Lemon*. See Pet. App. 19a (considering whether practice "must be viewed as an endorsement of a *particular religious viewpoint*") (emphasis added). The difference between these two questions cannot be lightly dismissed: it is well-settled that legislative prayers—nonsectarian or otherwise—would not pass the *Lemon* test. See Pet. App. 82a n.42.

The Fourth and Eleventh Circuits have likewise applied *Marsh*, rather than *Lemon*, in legislative-prayer cases. See *Atheists of Fla., Inc.* v. *City of Lakeland, Fla.*, __ F.3d __, No. 12-11613, 2013 WL 1197772, at *10 (11th Cir. Mar. 26, 2013) ("Supreme Court did not apply the *Lemon* test" in *Marsh*); *Joyner*

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individual prayer, *in isolation*, rose to the level of a constitutional violation. See Pet. App. 21a-22a (contrasting "any single prayer" with the "totality of the circumstances presented [by] the town's prayer practice").

v. *Forsyth Cnty., N.C.*, 653 F.3d 341, 345-350 (4th Cir. 2011) (applying *Marsh* and its progeny, while declining even to cite *Lemon*), cert. denied, 132 S. Ct. 1097 (2012); *Pelphrey*, 547 F.3d at 1269 (*Marsh* was decided "without applying *Lemon*"); *Simpson* v. *Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 281 (4th Cir. 2005) (*Marsh* "declined to apply" *Lemon*). And the Ninth Circuit has followed suit. *Rubin*, 2013 WL 1198095, at *3 ("[T]his case falls within the ambit of *Marsh*."). As a district court recently concluded after canvassing the circuits' jurisprudence, "no legislative-prayer case that post-dates *Marsh* * * * either (1) disregards *Marsh* or (2) relies on *Lemon*." *Jones* v. *Hamilton Cnty., Tenn.*, 891 F. Supp. 2d 870, 880 n.6 (E.D. Tenn. 2012).

B. The circuits agree on the nature of the *Marsh* analysis.

1. Petitioner contends that the Second, Fourth and Eleventh circuits disagree on whether the content of clergy's prayers can be considered in the *Marsh* analysis. Pet. 13 & n.2. In petitioner's telling, *Pelphrey* turned a blind eye to sectarian references, while *Joyner* and the court below impermissibly parsed the prayers by considering their sectarian content. Pet. 11-13.

But *Pelphrey* straightforwardly observed that "*Marsh* * * * weighed all of the factors that comprised the practice, *including the nature of the prayers*, the identity of the speaker, and the selection of the clergy." *Pelphrey*, 547 F.3d at 1281-1282 (emphasis added); accord *id.* at 1271 (noting that *Marsh* "considered several factors"—"the chaplain's religious affiliation, his tenure, and the overall nature of his prayers"); *ibid.*

("'nonsectarian' nature of the [*Marsh*] chaplain's prayers was one factor in * * * fact-intensive analysis"). In turn, the Eleventh Circuit evaluated these same factors (see *id.* at 1277-1278) to conclude that the commission's practice, "taken as a whole," did not advance any one religion (*id.* at 1278). A more recent Eleventh Circuit decision reiterated that *Pelphrey*'s multi-factor test requires consideration of "the nature of the prayers," and went on to evaluate the speaker-selection process, and the religious diversity of prayers and prayer-givers, in upholding the practice challenged there. *Lakeland*, 2013 WL 1197772, at *11-*14 (quoting *Pelphrey*, 547 F.3d at 1277).[3]

Thus, *Pelphrey*'s approach was no different than the one taken by the Second and Fourth Circuits. The court below weighed the "totality of the circumstances," taking stock of "the prayer-giver selection process, the content of the prayers, and the contextual actions (and inactions) of prayer-givers and town officials." Pet. App. 19a; see also Pet. App. 18a, 19a (noting that "[i]n fact-intensive cases like this one," no "single aspect of the town's prayer practice" is dispositive). *Joyner* likewise evaluated the commission's practice "taken as a whole." 653 F.3d at 353; see also *id.* at 344-345, 349-355 (discussing content of prayers, religious affiliations of prayer-givers, and county officials' actions and

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[3] The Tenth Circuit highlighted these same factors in *Snyder* v. *Murray City Corp.*, 159 F.3d 1227, 1228 (10th Cir. 1998) (noting prayer-giver diversity); *id.* at 1233-1235 & n.12 (examining content of prayer); *id.* at 1234 (reviewing prayer-giver selection).

inactions).[4]

Indeed, Judge Wilkinson, writing for the court in *Joyner*, noted that "the *Pelphrey* court adopted the same approach" that the Fourth Circuit has. 653 F.3d at 353. The Second Circuit similarly concluded that "[t]he other circuits that have addressed the issue, while acknowledging the limits on 'parsing' prayers, have consistently looked to substance." Pet. App. 21a n.6 (citing *Pelphrey*, 547 F.3d at 1277-1278; *Hinrichs* v. *Bosma*, 440 F.3d 393, 399 (7th Cir. 2006) (denying stay pending appeal), injunction vacated on standing grounds, 506 F.3d 584 (7th Cir. 2007); *Wynne* v. *Town of Great Falls, S.C.*, 376 F.3d 292, 299 n.4 (4th Cir. 2004)). Indeed, petitioner's claim of a circuit split is especially puzzling because the cases it cites as evincing that split themselves described the circuits' jurisprudence as in alignment.

2. The circuits also agree that, while the content of prayers is relevant to the analysis, it is not dispositive; sectarian references, standing alone, are "not inherently a problem." Pet. App. 21a; see also Pet. App. 16a ("*Marsh* * * * is hard to read, even in light of [*County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989)], as saying that denominational prayers, in and of themselves, violate the Establishment Clause."); *Rubin*, 2013 WL 1198095, at *6 ("[W]e join several of our sister circuits in

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[4] To say that courts have reviewed the overall content of prayers is not to say that they have decided "theological questions." Cf. Theologians' Br. 8. Indeed, the theologians fail to identify a single theological question that was discussed, let alone decided, below.

concluding that neither *Marsh* nor *Allegheny* categorically forbids sectarian references in legislative prayer."); *Joyner*, 653 F.3d at 349 ("Infrequent references to specific deities, standing alone, do not suffice to make out a constitutional case."); *Pelphrey*, 547 F.3d at 1271 (*Marsh* cannot be read "as allowing only nonsectarian prayers"); *Snyder* v. *Murray City Corp.*, 159 F.3d 1227, 1234 n.10 (10th Cir. 1998) ("[T]he mere fact [that] a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause."). Petitioner thus errs when it posits "a conflict among the courts of appeals over whether the Establishment Clause precludes legislative invocations that reference particular religious traditions." Pet. 13 n.2.

3. The differing results in the circuits' decisions have flowed not from a conflict in legal principle or an overriding focus on the frequency of sectarian references, but from material factual differences among the cases.

a. In *Pelphrey*, a diversity of prayer-givers and religious references led the court to conclude that the commission had not affiliated itself with any one faith. 547 F.3d at 1277-1278. Nor was the "inclusion of diverse faiths [ ] merely a 'token' gesture to mechanically avoid judicial intervention." *Pelphrey* v. *Cobb Cnty., Ga.*, 448 F. Supp. 2d 1357, 1369 (N.D. Ga. 2006), aff'd, 547 F.3d 1263 (11th Cir. 2008). In fact, non-Christians had presented prayers before the County Commission in each of the five years preceding the record's closure. See Pls.' Mot. Summ. J. Exh. C Attach. 1 at 14-31, *Pelphrey*, No. 1:05 Civ. 2075-RWS

(N.D. Ga.); see also *Lakeland*, 2013 WL 1197772, at *13 (noting that prayers and prayer-givers in 2010 and 2011 were religiously diverse, and that county even welcomed "speakers from congregations outside the county"). And after citizens "voiced concerns about the invocation practice, the number of [Christian-specific] sectarian references dropped significantly, approaching the 50% mark." *Pelphrey*, 448 F. Supp. 2d at 1361 n.7. Here, in contrast, with the exception of a brief hiatus triggered by this lawsuit, Christian clergy have delivered *all* of the prayers in the record. Pet. App. 4a-5a, 19a. And the frequency of sectarian references has actually *increased* over time: in the eighteen months preceding the record's closure—a time period highly relevant to the propriety of injunctive relief—100% of the prayer-givers, and approximately 90% of the prayers, were Christian. See pages 2-3, *supra*. *Joyner* involved a similar situation: no non-Christian had delivered the prayer there in the year-and-a-half before the record closed. 653 F.3d at 353.

b. *Pelphrey* did not involve prayer-givers who routinely elaborated on Christian theology or disparaged objectors. See 547 F.3d at 1266 (characterizing sectarian references as "ordinarily" "brief"). And in *Lakeland*, the city proactively directed prayer-givers to "maintain a spirit of respect and ecumenism" and to avoid proselytizing and disparaging remarks. Pls.' Mot. Summ. J. Exh. 4 at 5, *Lakeland*, No. 8:10 Civ. 1538-T-17-MAP (M.D. Fla.). Here, the Town makes no such request, so prayer-givers have discussed and celebrated the resurrection of Jesus Christ, requested the audience's recitation of the Lord's Prayer, discussed soliciting contributions for a

particular congregation, and disparaged objectors as an "ignorant" "minority." See page 3-4, *supra*. Similarly, in *Joyner*, one prayer-giver expressed appreciation for "the stand the Board took as a whole allowing me, a minister of the Gospel of the Lord Jesus Christ, to be able to pray as the New Testament instructs," and others regularly delivered invocations that "not only invoked Jesus' name throughout" but also "invoked specific tenets and articles of * * * Christianity." 653 F.3d at 344, 350.

c. The legislative-prayer practices in *Pelphrey* and *Lakeland* were truly even-handed: both cases involved random scheduling processes (*Pelphrey*, 547 F.3d at 1268; *Lakeland*, 2013 WL 1197772, at *13-*14; Pls.' Mot. Summ. J. Exh. 4 at 5, *Lakeland*, No. 8:10 Civ. 1538-T-17-MAP (M.D. Fla.)); in neither case was there any indication that government officials had otherwise manifested an alliance with Christian prayer-givers; and the City of Lakeland had affirmatively disclaimed any endorsement of prayer-givers' beliefs (*Lakeland*, 2013 WL 1197772, at *6). Here, by contrast, the Town has favored certain prayer-givers in the scheduling process; Town officials have denominated Christian, but not non-Christian, prayer-givers as their "Town chaplain"; Supervisor Auberger has expressed an even greater affinity with select Christian prayer-givers; and Board members have engaged in uniquely Christian behavior. See pages 2-5, *supra*; Pet. App. 19a-23a & n.5. In *Joyner*, the Board had likewise taken affirmative measures to encourage sectarian prayers. 653 F.3d at 353-354.

d. Finally, there was no indication in *Pelphrey* that

some members of the audience were required to attend meetings or that attendees faced pressures to participate in the prayers. See *Pelphrey* v. *Cobb Cnty., Ga.*, 410 F. Supp. 2d 1324, 1325 (N.D. Ga. 2006) (prayer introduced with "for all who wish to do so, please rise for the invocation and the Pledge"); see also *Lakeland*, 2013 WL 1197772, at *4, *5 (upholding policy providing that "[n]o member or employee of the Commission or any other person in attendance * * * shall be required to participate in any invocation" and that "only those who wish to do so" can be invited to stand). Here, many individuals—such as various Town employees, new police officers, and those seeking zoning variances—are required to attend meetings. See page 5, *supra*. Children also attend, not as mere observers, but as actual meeting participants. See, *e.g.*, C.A. App. 383, 411, 779.[5] And, as in *Joyner* (653 F.3d at 345, 354), the actions of prayer-givers, the Board, and audience members placed pressure on attendees to participate in the prayers. See Pet App. 23a.

All of these considerations, not just the overwhelming frequency of sectarian references, led the court below to conclude, correctly, that the town had exploited the prayer opportunity to advance a single faith. Pet. App. 18a-27a. In light of the "fact-intensive" nature of the *Marsh* analysis (*Pelphrey*, 547

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[5] Although "there is no reason to believe that children are any more present in [Greece] Board meetings than they were in meetings of the Nebraska legislature" (Pet. App. 24a n.8), there *is* reason to believe that children are involved in Greece's meetings to a greater degree than they were in *Pelphrey* and *Lakeland*, neither of which mentioned children's attendance.

F.3d at 1271), it is neither remarkable nor surprising that the Second Circuit reached this result; that other circuits have similarly enjoined offending prayer practices; and that still other circuits, on different facts, have upheld legislative-prayer policies. Far from evincing a circuit split, these differing results simply illustrate that the role of a court is to apply the law to the facts. That the defendants do not always prevail is not a legitimate basis to cry foul. Cf. Pet. 16 (legislative-prayer defendants should win "in most instances").

C. The circuit split putatively created by *Rubin* v. *City of Lancaster* is both overstated and irrelevant.

Since the filing of the petition, the Ninth Circuit issued a decision in which it claimed to create a circuit split regarding one element of the *Marsh* inquiry. Because the case at hand would come out the same way under even the Ninth Circuit's standard, it presents a poor vehicle for resolving that putative split.

1. At most, *Rubin* diverges from the decision below with respect to a single aspect of a multi-factor test.

In *Rubin*, the Ninth Circuit considered a situation in which a city bent over backwards to ensure that its practice was both diverse and evenhanded. 2013 WL 1198095, at *9. The city had taken proactive measures to invite people of all religious persuasions; it followed a truly random scheduling process; it explicitly proclaimed respect for the city's diversity of religious denominations; it disclaimed any intention to affiliate with any faith; and it requested that prayer-givers

"maintain a spirit of respect and ecumenism" and avoid disparaging or proselytizing remarks. *Id.* at *9-*10 & n.13. As a result of the city's efforts, six of twenty-six prayer-givers were non-Christian—but, despite the city's request that prayers be ecumenical, all the Christian prayer-givers referenced Jesus Christ. *Id.* at *2.

In evaluating that practice, the Ninth Circuit held that the question "is not simply whether, given the frequency of Christian invocations, the reasonable observer of Lancaster's city-council meetings would infer favoritism toward Christianity. Rather, it is whether the City itself has taken steps to affiliate itself with Christianity." *Rubin*, 2013 WL 1198095, at *9. Because the government had "taken every feasible precaution * * * to ensure its own evenhandedness" (*ibid.*), the court concluded that the content of the prayers and the denominations of prayer-givers were of no consequence, as they were a function of local demographics rather than governmental choice (*id.* at *10-*11).

The *Rubin* panel averred that its holding was in conflict with *Joyner* and the decision below, which *Rubin* characterized as "invalidating any legislative-prayer practice that, from the vantage point of the prayers' listeners, has resulted in too large a proportion of sectarian invocations from one particular religious group." *Rubin*, 2013 WL 1198095, at *7. But the Second Circuit actually rejected having the legitimacy of a prayer practice turn on the frequency of sectarian references. See Pet. App. 15a-17a (critiquing sectarian/nonsectarian distinction); Pet. App. 16a

("*Marsh* * * * is hard to read, even in light of *Allegheny*, as saying that denominational prayers, in and of themselves, violate the Establishment Clause."); Pet. App. 21a (sectarian references are "not inherently a problem"). Instead of focusing on the content of clergy's presentations, the Second Circuit emphasized the actions of "town officials themselves." Pet. App. 26a; see also Part I.B.3.c., *supra*.[6] Indeed, the Second Circuit expressly approved a practice not unlike the one upheld in *Rubin*:

> [I]t seems to us that a practice such as the one to which the town here apparently aspired—one that is inclusive of multiple beliefs and makes clear, in public word and gesture, that the prayers offered are presented by a randomly chosen group of volunteers, who do not express an official town religion, and do not purport to speak on behalf of all the town's residents or to compel their assent to a particular belief—is fully compatible with the First Amendment.

Pet. App. 26a. Accordingly, any split created by *Rubin* is considerably less pronounced than the Ninth Circuit suggested.

Insofar as *Rubin* is read to create a circuit split, the split relates to, at most, one aspect of a test that even *Rubin* otherwise deems to be plenary. 2013 WL

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[6] Although the *Joyner* court placed substantial emphasis on the content of Forsyth County's prayers (653 F.3d at 349-350), it also faulted county officials for taking steps that encouraged sectarian references (*id.* at 353-354), and for placing pressure on audience members to participate in the prayers (*id.* at 344-345, 355).

1198095, at *7 (agreeing with decision below that prayer practice must be "viewed in its entirety"). So while the Second, Fourth, and Eleventh Circuits may assess the full totality of circumstances surrounding a challenged prayer practice—including the actions taken by members of the legislative body, the prayer-giver-selection process, and the resulting religious diversity—*Rubin* would place the last of these considerations off-limits when an analysis of the other factors indicates that the legislative body has been truly inclusive and evenhanded. *Id.* at *9-*10. In all other respects, *Rubin* keeps company with the decisions of the other circuits. See *id.* at *4 n.5, *6-*7 & n.6 (citing decision below on numerous points of overlap).

2. This case does not turn on the single factor over which the putative conflict exists.

This case is a poor vehicle for resolving the split that *Rubin* allegedly creates, because it would be decided the same way on either side of the divide. Indeed, as mentioned above, the panel below reached the result that it did in no small part because of actions undertaken by "town officials themselves." Pet. App 26a. It was not the "homogeneity of viewpoints reflected by the invocations" that doomed the Town's practice; rather, it was that, "despite th[at] homogeneity * * *, the *town* did not explain that it intended the prayers to solemnize Board meetings, rather than to affiliate the town with any particular creed," and did not request that prayer-givers avoid proselytizing or disparaging remarks. Pet. App. 22a (emphasis added). Similarly, it was not the Christian

affiliation of prayer-givers that swayed the court; it was that "[t]he *town's process for selecting prayer-givers* virtually ensured a Christian viewpoint." Pet. App. 19a (emphasis added). Likewise, it was not simply that prayer-givers spoke on behalf of the Town and its residents, it was that "Town officials * * * contributed to the impression that these prayer-givers spoke on the town's behalf" by denominating Christian prayer-givers as Town chaplains, by expressing an even greater affinity with select Christian prayer-givers, and by participating in the prayers with uniquely Christian behavior. Pet. App. 23a; see also pages 4-5, *supra*.

Because Town officials played an affirmative role in creating an impermissible affiliation, this case does not fairly present the legal question over which the alleged conflict exists. The case thus does not provide a suitable opportunity for conducting the careful line-drawing that is called for when this Court intervenes. The Court accordingly should wait for a case—perhaps *Rubin* itself—in which a truly evenhanded practice nonetheless yields prayers that are decidedly sectarian. Only then would a choice between standards affect the outcome. And if no such case ever presents itself, it would simply highlight that *Rubin*'s putative circuit split is of no import.

Furthermore, because of the self-avowed circuit split created by the *Rubin* panel, together with the panel's make-up (one active judge, one senior judge, and a district judge sitting by designation), the Ninth Circuit's history of granting en banc review, and the lack of any need for the court to have reached the

question that it did,[7] the decision in *Rubin* stands a reasonable chance of being reheard. And respondents' counsel has confirmed that plaintiffs' counsel in *Rubin* does indeed plan to seek rehearing. If the decision were to be reheard, the en banc Ninth Circuit could very well appreciate—like the Fourth Circuit did in *Joyner* and the Second Circuit did below—that there is, indeed, no meaningful split among the circuits.

Finally, even if *Rubin* is not reheard, its recent vintage counsels in favor of allowing the other circuits, and the district courts, to wrestle with its reasoning before this Court considers its merits. Until other courts have had an opportunity to apply the *Rubin* standard to various factual scenarios, the meaning and reach of the decision remain unknown. An appeals court's adoption of a novel standard, just days ago, is a quintessential circumstance in which patience should prevail.

II. The Second Circuit's Opinion Does Not Conflict With This Court's Decisions, Which Are Themselves Harmonious.

Petitioner asserts that the decision below is in conflict with this Court's decisions in *Marsh* and *Lee* v. *Weisman*, 505 U.S. 577 (1992). Pet. 15-19. Petitioner claims that *Allegheny* is to blame for having led the

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[7] Because the plaintiffs had challenged a single reference to Jesus Christ, rather than the city's invocation policy as a whole (*Rubin* v. *City of Lancaster*, 802 F. Supp. 2d 1107, 1111 (C.D. Cal. 2011), aff'd, No. 11-56318, 2013 WL 1198095 (9th Cir. Mar. 26, 2013)), the portion of *Rubin* that creates a circuit split is *dictum* (2013 WL 1198095, at *2 n.3).

Second Circuit astray, as *Allegheny* itself is in "perceived conflict" with *Marsh*. Pet. 19. But these alleged conflicts rest on caricatures of the Court's decisions. The Court's jurisprudence is harmonious, and the decision below is faithful to all of it.

A. Petitioner contends that the decision below departs from *Marsh*'s "bright-line rules" that "the touchstone for whether legislative prayer is constitutional is whether the government acts with impermissible motive" (Pet. 16, 17-18), and that prayers' content is irrelevant absent a showing of religious animus (Pet. 15). But that is not what *Marsh* held. It held that "[t]he content of the prayer is not of concern to judges where * * * there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-795. If the *Marsh* Court had been of the view that exploitation arises only when a legislative body acts with a requisite level of scienter, it could easily have said so—in far fewer words. Instead, *Marsh* itself addressed the question of "impermissible motive" separately from the question of whether the prayer opportunity had been exploited. *Id.* at 792-795; see also *Pelphrey*, 547 F.3d at 1277-1278 (separately analyzing whether "the [s]election [p]rocess * * * [w]as * * * [b]ased on an [i]mpermissible [m]otive" and whether "the [i]dentity of the [s]peakers and the [n]ature of the [p]rayers * * *

[a]dvance[d] a [s]ingle [r]eligion").[8]

If the government's intent were all that mattered, not only would prayers exclusive to a single faith prevail in countless communities around the country, but prayer-givers could deliver diatribes against other creeds, seek to convert members of the audience, denigrate the beliefs of minority groups, and call out members of the audience who dissent or fail to participate. And they could do so with relative impunity, because "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislat[ure's actions]." *Palmer* v. *Thompson*, 403 U.S. 217, 224 (1971). In addition to failing to heed the Court's disfavor of legal standards that call for courts to inquire into government officials' subjective intent (see, *e.g.*,

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[8] *Amicus curiae* Robert Palmer claims that his removal of references to Christ was a "post-litigation modification" after "the record ended." Palmer Br. 8. But the trial court took evidence regarding the change, so it most certainly took place before the record closed. See Palmer Dep. Exh. 5, *Chambers* v. *Marsh*, No. Civ. 79-L-294 (D. Neb.) ("[Y]ou may look at the prayers offered during 1980 from that point on * * * and I don't think there is any reference to Jesus or Christ * * * "). Palmer also claims that, by characterizing his prayers as "nonsectarian," he meant only that they were not specific to any particular *Christian* denomination. Palmer Br. 9. But he testified that a "[n]onsectarian [prayer] is one that does not promote * * * any specific group, cult or division of the *Judeo-Christian faith*"—not the Christian faith alone. Palmer Dep. Exh. 5, *Marsh*, No. Civ. 79-L-294 (emphasis added). Another deposition passage captures the point even more clearly: when asked whether a particular prayer reflected "the Judeo-Christian tradition," Palmer replied that the entire prayer did, "except for the last sentence," which referenced "the name of Christ Our Lord." Palmer Dep. Exh. 5, *Marsh*, No. Civ. 79-L-294.

Harlow v. *Fitzgerald*, 457 U.S. 800, 815-818 (1982)), this result would "do[ ] violence to the pluralistic and inclusive values that are a defining feature of American public life," disregard the "inclusive aspect" of legislative prayer that *Marsh* took pains to emphasize, and "surrender the essence of the Establishment Clause." *Joyner*, 653 F.3d at 347, 351. "*Marsh* did not countenance any such idea." *Id.* at 351.

B. Petitioner contends that the decision below is in tension with *Lee*'s warning against government's superintending the content of prayers. Pet. 17-18. As Justice O'Connor has explained, this argument "misses the mark." *Turner* v. *City Council*, 534 F.3d 352, 355 (4th Cir. 2008) (O'Connor, J., sitting by designation). *Lee* disallowed a rabbi's prayer at a public-school graduation because, in the context of "a formal religious exercise which students * * * are obliged to attend," "it is no part of the business of government to compose official prayers"—whether nonsectarian or otherwise. 505 U.S. at 588, 589 (quoting *Engel* v. *Vitale*, 370 U.S. 421, 425 (1962)). *Marsh*, in contrast, permits legislative bodies to deliver prayers and to rely on government-employed chaplains as their mouthpieces. 463 U.S. at 793-794. So while *Lee* may counsel a light touch with respect to prayers' content (see Pet. App. 15a-16a), it is illogical to assert that *Lee* altogether bars government officials from crafting the prayers that *Marsh* permits them to deliver.

C. Finally, petitioner claims that the source of all the confusion is *Allegheny*'s criticism of sectarian references. Pet. 19-21. But *Allegheny* did not hold that such references "must be expunged" (Pet. 20), any more

than *Marsh* held that they must be ignored. *Allegheny*'s statement that the prayers in *Marsh* were upheld "because" of the chaplain's removal of the sectarian references (*Allegheny*, 492 U.S. at 603) merely acknowledges that removing sectarian references is one way—not the *only* way—that a legislature can avoid impermissible affiliations. See, *e.g.*, Pet. App. 16a (*Allegheny* "does not mean" that all denominational references must be avoided); *Rubin*, 2013 WL 1198095, at *6 ("*Allegheny* does not in fact say that a legislative prayer is constitutional only if nonsectarian."); *Pelphrey*, 547 F.3d at 1271-1272 ("*Allegheny* does not require that legislative prayer conform to the model in *Marsh*.").

Nor did *Allegheny* suggest that legislative prayers should be analyzed under the *Lemon* or endorsement test when it acknowledged *Marsh*'s concern with legislative prayers' "effect." Cf. Pet. 20-21. *Marsh* itself considered whether the chaplain's "long tenure ha[d] the effect of giving preference to his religious views." 463 U.S. at 793; see also *Pelphrey*, 547 F.3d at 1277 (analyzing whether prayer practice "had 'the effect of affiliating the government with any one specific faith'" (quoting *Allegheny*, 492 U.S. at 603)).[9]

In light of the harmonious nature of this Court's jurisprudence, it is hardly surprising that no circuit

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[9] That is not to say that *Marsh* and *Lemon* are concerned with the same effect: *Marsh* precludes practices that have the effect of advancing a single faith, while *Lemon* prohibits, among other things, actions that have the primary effect of advancing even religion in general. See page 11, *supra*.

has perceived the conflict that petitioner posits. Instead, the circuits have drawn guidance from *all* of the Court's decisions, deeming them to be complementary rather than contradictory. Pet. App. 10a-18a (relying on *Marsh*, *Allegheny*, and *Lee*); *Rubin*, 2013 WL 1198095, at *6 ("Far from displacing *Marsh*, *Allegheny* merely illuminates its boundaries."); *id.* at *11 (relying on *Lee*); *Pelphrey*, 547 F.3d at 1271 ("*Marsh*, as informed by *Allegheny* and *Lee*, controls our review of the constitutionality of legislative prayers.").

III. Petitioner's Private-Speech Claim Was Not Preserved And Lacks Merit.

Petitioner argues that the decision below conflicts with this Court's limited-public-forum jurisprudence. Pet. 23-25. It faults the Second Circuit for having ruled "without regard" to the "critically important" free-speech rights of clergy to deliver prayers of their choosing. Pet. 23, 25. But petitioner itself never asserted these alleged rights, either before the Second Circuit or the district court; nor did petitioner cite any of the limited-public-forum cases that it cites now.[10] Accordingly, petitioner has failed to preserve this claim. See, *e.g.*, *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001) (petitioner cannot "assert new substantive arguments attacking * * * the judgment when those arguments were not pressed in the court

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[10] Petitioner mentioned *in a footnote* on appeal (but not in the district court) that the venue "ha[d] many characteristics of a limited public forum" (Appellees' C.A. Br. 39 n.16), but it never argued that the venue was, in fact, such a forum.

whose opinion we are reviewing").

Petitioner's silence on this issue was likely driven by the fact that the argument is specious: lower courts have consistently refused to treat legislative prayers—whether delivered by public officials or by invited clergy—as private speech. See, *e.g.*, *Pelphrey*, 547 F.3d at 1266-1282 (applying Establishment Clause, not Free Speech Clause, to prayers delivered by outside clergy); *Turner*, 534 F.3d at 355 (prayers offered by city council members "[were] government speech"); *Simpson*, 404 F.3d at 288 (invocations offered by various religious leaders "[were] government speech"); *Snyder*, 159 F.3d at 1235 (characterizing clergy-led prayer at municipal council meetings as "government prayer," and holding that council was "well within its rights" to prohibit resident's prayer). As in *Turner*, petitioner has not identified "a single case in which a legislative prayer was treated as individual or private speech." 534 F.3d at 355.

IV. The Decision Below Imperils Neither State Nor Federal Practices.

Petitioner argues that the circuits' treatment of legislative prayer "changed dramatically" with the Fourth Circuit's decision in *Wynne*, such that the "ubiquitous American tradition of legislative prayers" is now under threat. Pet. 26. But in the nine years since *Wynne*, legislative prayer has thrived: prayers "are still going strong today" in both houses of the U.S. Congress and in the legislatures of forty-nine of the fifty states. Indiana Br. 5-7.

The Indiana brief contends that the Second

Circuit's ruling renders states' practices "vulnerable," but Indiana describes only its own practice, and does so with outdated evidence. Indiana Br. 8, 15-16. While space limitations preclude a comprehensive discussion of the current practices of all eighteen states that joined the Indiana brief, a review of the practice followed by one—Florida—demonstrates that the decision below is not the harbinger of doom that *amici* describe.

Although a majority of Florida's legislative prayer-givers are Christian, prayers are also delivered by legislators, members of the military, and members of the Native American, Buddhist, and Jewish faiths.[11] Prayer-givers in the Florida Senate are directed to use terms "that allow persons of different faiths to give assent to what is said," and to "use[ ] universal, inclusive terms for the deity rather than proper names for divine manifestations." App. 1a-2a. Prayer-givers in the Florida House are likewise "expected to use common language" and are reminded that "[r]eligious sectarianism * * * is not only a breach of etiquette, but represents insensitivity to the faith of others." App. 3a, 4a. Accordingly, in 2011 and 2012, approximately one-third of the prayers in the House, and just three out of forty-four prayers in the Senate, included Christian

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[11] See Fla. H.R., *Session Specific Documents*, http://www.myfloridahouse.gov/Sections/Documents/publications.aspx (last visited Apr. 6, 2013) (follow "House Journals" hyperlink for 2011 and 2012; then follow "Complete" bound journal hyperlink); see also Fla. S., *Senate Journals*, http://www.flsenate.gov/Session/Journals.cfm (last visited Apr. 6, 2013) (follow "Final Bound Journal" hyperlinks for 2011 and 2012).

language. See note 11, *supra*.[12] It is thus petitioner's interpretation of the law, not the decision below, with which the Sunshine State should take issue: if petitioners were correct about what *Marsh* and *Lee* require, Florida's apparently inclusive practices would reflect unconstitutional censorship of prayer and free speech.

The brief filed by some members of the U.S. House of Representatives[13] likewise errs in suggesting that the Second Circuit's decision will jeopardize that institution's practice. While Christian clergy present a majority of the House's prayers, non-Christian guest chaplains routinely deliver prayers, and have done so consistently in the last several years.[14] And the percentage of sectarian references is far lower than it is in the Town of Greece: approximately half (rather than up to 90%) of the prayers in the 112th Congress contained Christian language, even under *amici*'s

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[12] These numbers rest on the same narrow definition of "sectarian" that was used in characterizing the prayers in the record below. See page 3, *supra*.

[13] Although the 112th Congress was a diverse body—with forty-four members who identified as Jewish, Muslim, or Buddhist (cf. Tracy Miller, *Faith on the Hill: The Religious Composition of the 112th Congress*, Pew Forum on Religion & Pub. Life (Feb. 28, 2011), http://tinyurl.com/pewforum112)—*no* non-Christian joined the brief.

[14] See Office of the Chaplain, U.S. H.R., *Guest Chaplains (2001–Present)*, http://tinyurl.com/guestchaplains (identifying religious affiliations of guest chaplains) (last visited Apr. 6, 2013). In the 111th and 112th Congresses, for example, Jewish or Muslim prayer-givers delivered invocations on at least seven occasions during each Congress.

expansive definition of "sectarian." See Members of Cong. Br. 10-20. Further, Greece Town Board meetings—in which both children and other Town residents routinely participate—are dissimilar in context to congressional sessions, "where spectators are incidental to the work of the public body" (*Coles* v. *Cleveland Bd. of Educ.*, 171 F.3d 369, 382 (6th Cir. 1999)). And because most citizens attend municipal-body meetings "only sporadically," they would not witness the full range of prayers in any given year. *Joyner*, 653 F.3d at 354. There is also no reason to believe that members of the House have taken action to align themselves with Christian prayer-givers, as Greece Town officials have (see pages 4-5, *supra*). It is precisely because of factual differences of this kind that the courts have eschewed the one-size-fits-all approach that petitioner advocates.

Petitioner's *amici* warn that this area of law could "slid[e] into irretrievable chaos" if this Court does not intervene, because "conflicting precedents leave state legislatures, localities, and subdivisions with very little guidance when it comes to crafting legislative prayer policies." Indiana Br. 13, 24. But their exemplar of this alleged conflict was reversed six years ago for lack of standing. *Id.* at 15-24 (discussing *Hinrichs* v. *Bosma*, 400 F. Supp. 2d 1103 (S.D. Ind. 2005), rev'd on standing grounds, 506 F.3d 584 (7th Cir. 2007)). Today, state and local legislatures have available to them substantial guidance, in the form of both decisional law

and model policies.[15] Indeed, as Judge Wilkinson noted in *Joyner*, the constitutional standard that this Court and the circuits have endorsed "asks * * * no more than what numerous public and governmental entities already meet." 653 F.3d at 354.

There has been no "litigation bonanza." Palmer Br. 17; cf. Pet. 27; Indiana Br. 10 & App. 1a-5a. Of the thirteen legislative-prayer lawsuits filed nationwide over the past nine years,[16] four arose in the Fourth Circuit, whose jurisprudence is well-settled (see Part I.A., *supra*); and several were decided or dismissed by district courts, without any hint that the litigants or the court had trouble discerning the law. See Indiana Br. 1a-5a. The filing of thirteen lawsuits over the course of a decade—many resolved without appeal, and

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[15] Indeed, a model policy can be found in the survey on which the Indiana brief heavily relies. See Nat'l Conf. of State Leg., *Inside the Legislative Process, Prayer Practices* 5-146 (2002), available at http://tinyurl.com/ncslprayer. The Indiana brief neglects to mention that this model policy cautions prayer-givers to "be especially sensitive to expressions that may be unsuitable to members of some faiths." *Ibid.* The National Conference for Community and Justice ("NCCJ") has published similar guidelines for "inclusive public prayer," which Florida's Senate and House have adopted. See NCCJ, *When You Are Asked to Give Public Prayer in a Diverse Society, Guidelines for Civic Occasions*, available at http://tinyurl.com/nccjprayer (last visited Apr. 6, 2013); see also App. 1a-4a (incorporating NCCJ recommendations).

[16] In an effort to pad their numbers, *amici* include school-board decisions in their tally. Indiana Br. App. 1a-5a. But these cases are inapposite, as the circuits have agreed that *Marsh* does not apply to school boards. See, *e.g.*, *Doe* v. *Indian River Sch. Dist.*, 653 F.3d 256, 275 (3d Cir. 2011); *Coles*, 171 F.3d at 381.

others resolved by appellate courts that have seen eye-to-eye—hardly reflects the sort of deep confusion warranting the Court's intervention.

V. It Would Be Premature For This Court To Address This Case.

Because the district court awarded the Town summary judgment, it has not had occasion to fashion an injunction. The Second Circuit remanded to allow the district court this opportunity, specifically instructing that the Town can continue to pray and that there is no single permissible way for the Town to do so. Pet. App. 16a, 25a-27a.

This case therefore arises in the same unripe posture as *Mount Soledad Memorial Ass'n* v. *Trunk*, 132 S. Ct. 2535 (2012) (mem.), denying cert. to 629 F.3d 1099 (9th Cir. 2011), in which Justice Alito observed:

> The current petitions come to us in an interlocutory posture. The Court of Appeals remanded the case to the District Court to fashion an appropriate remedy, and, in doing so, the Court of Appeals emphasized that its decision "d[id] not mean that the Memorial could not be modified to pass constitutional muster [or] that no cross can be part of [the Memorial]." 629 F.3d, at 1125. Because no final judgment has been rendered and it remains unclear precisely what action the Federal Government will be required to take, I agree with the Court's decision to deny the petitions for certiorari.

Mount Soledad, 132 S. Ct. at 2536 (Alito, J., statement respecting denial of cert.) (citing cases).

As in *Mount Soledad*, a denial of the petition here would "not amount to a ruling on the merits, and [petitioner] is free to raise the same issue in a later petition following entry of a final judgment." *Ibid.* Until then, the case is not ripe for consideration by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 8, 2013

APPENDIX

Seal

THE FLORIDA SENATE
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Debbie Brown
Secretary

MEMORANDUM

To: All Senators
From: Debbie Brown, Secretary of the Senate
Subject: Chaplains for 2013 Session
Date: January 17, 2013

Each year we ask all Senators to make recommendations for chaplains to give the opening prayer during session. Chaplains are not paid expenses for travel to and from the capital area but there is an honorarium in the amount of $150.00.

Please remember that because the Senate includes members of many faiths, the Senate President asks that chaplains observe the guidelines for public prayer that have been suggested by the National Conference for Community and Justice. **These guidelines call for prayer that:**

- **seeks the highest common denominator without compromise of conscience;**
- **calls upon God on behalf of the group as a whole and avoids individual petitions;**
- **uses forms and vocabulary that allow persons of different faiths to give assent to what is said;**
- **uses universal, inclusive terms for the**

deity rather than proper names for divine manifestations. Some opening ascriptions are "Mighty God," "Our Maker," "Source of All Being," or "Creator and Sustainer." Possible closing words include "Hear Our Prayer," "In Thy Name," or simply "Amen"; and

- **remains faithful to the purposes of acknowledging divine presence and seeking blessing; not preaching, arguing, or testifying.**

Please send the name, address and telephone number of your prospective chaplain to Lucy Carter in this office. Also, include possible dates he or she might want to come to Tallahassee and we will work out the details with each of them. You may contact Lucy at (850) 487-5270 or carter.lucy@flsenate.gov. We will also call on some of you to say the prayer from time to time.

DB:lc

DON GAETZ
President of the Senate

GARRETT RICHTER
President Pro Tempore

SUGGESTED INTERRELIGIOUS GUIDELINES FOR PRAYER ON PUBLIC OCCASIONS

As Recommended by the National Conference for Community and Justice

Accepting an invitation to lead the general community in prayer includes a genuine responsibility to be sensitive to the diversity of faiths among those in whose names the prayer is being offered. A request to offer a public invocation, blessing, benediction or other form of prayer should not be construed as an opportunity to give a personal testimony or a Bible devotional. Such religious meditations or preaching should be reserved for a house of worship or for public events where the sponsors specifically request it. Religious sectarianism at public events is not only a breach of etiquette, but represents insensitivity to the faith of others.

SOME BASIC GUIDELINES

Before rendering a public prayer, it may be most worthwhile to consider several guidelines relevant to the community setting:

1). Special Occasions

In giving an invocation or benediction one calls upon God's presence on behalf of the particular public gathered (civic clubs, chamber of commerce, graduations, baccalaureates, etc.). Consequently, one is serving as a representative for others present and not as an individual petitioner.

2). Common Language

In communicating on behalf of others, one is expected to use common language and share symbols, which are acceptable and understandable and not offensive or unintelligible. When appropriate, one may want to utilize a moment of group silence or consider a creative alternative. The challenge is to seek the "highest common denominator" and the best level of inspiration without compromise of conscience.

3). Nature of Public Prayer

Such a public prayer may call for addressing, confessing, appealing and advocating. It is not an occasion for preaching or testifying to the public.

4). Appropriate Expressions

In opening and closing the prayer, the leader should be especially sensitive to expressions that may be unsuitable to members of some faiths.

REPLY BRIEF

Supreme Court, U.S.
FILED
APR 23 2013
OFFICE OF THE CLERK

No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The statement of the parties to the proceeding and the corporate disclosure statement included in the petition for a writ of certiorari remain accurate.

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REPLY BRIEF FOR PETITIONER

Respondents concede that the circuits are divided over the proper legal standard to apply in evaluating the constitutionality of legislative prayer (Opp. 1, 19), but Respondents nonetheless claim that all courts of appeals "agree" that some variation of an amorphous "totality of the circumstance" test applies. *Id.* at 1, 10. To the contrary, there is now an even deeper split between those circuits that engage in a wide-ranging inquiry into whether legislative prayer practices have an impermissible "effect" on a reasonable observer (*id.* at 11, 28), and those that instead conduct the limited inquiry mandated by this Court's precedents, asking only whether a prayer opportunity has been "exploited" to proselytize, or to advance or disparage a particular faith. *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983).

Unable to show that no circuit conflict exists, Respondents instead distort the record and rely on allegations not deemed relevant by the court of appeals. But their brief in opposition fails to identify any impediment to this Court's review of the important question presented. Certiorari should be granted.

I. THE CIRCUIT CONFLICT HAS DEEPENED SINCE THE PETITION WAS FILED

The conflict among the circuits regarding the proper standard for evaluating legislative prayer practices has deepened since the petition was filed. In *Rubin v. City of Lancaster*, No. 11-56318, 2013 WL 1198095, at *7 (9th Cir. Mar. 26, 2013), the Ninth Circuit explicitly held that this Court's decision in *Marsh* "require[s] a different inquiry" from that employed by the Second Circuit below and by the

Fourth Circuit in *Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011), *cert denied*, 132 S. Ct. 1097 (2012).

There is a stark difference between the law in the Second and Fourth Circuits on one hand, and the law in the Ninth Circuit on the other, which Respondents characterize as adopting "a novel standard"—thus acknowledging a circuit split. Opp. 24. The *Rubin* court evaluated legislative prayer practices based on whether "'*the government* has placed its imprimatur, deliberately or by implication, on any one faith or religion'"; this inquiry does not "*pivot on the practice's effect on the disapproving listener.*" 2013 WL 1198095, at *7 (second emphasis added) (quoting *Joyner*, 653 F.3d at 362 (Niemeyer, J., dissenting)). The Ninth Circuit's test thus examines "the *government's* reasons" for adopting a particular prayer practice, irrespective of the message the practice "might have conveyed." *Id.* at *8.

By contrast, the analysis employed by the Second and Fourth Circuits *expressly* pivots on the practice's effect on the listener. In the decision below, the Second Circuit evaluated the Town's prayer practice by asking whether an "ordinary, reasonable observer" would have understood it to "conve[y] the view that the [Town] favored or disfavored certain religious beliefs," and by examining whether such an observer would have understood the Town's practice as endorsing "particular religious beliefs." Pet. App. 19a. The Fourth Circuit's analysis similarly hinges on whether the challenged prayer practice aligns the government with a particular religious group in the eyes of a reasonable observer. *Joyner*, 653 F.3d at 348, 354-55. This "observer-based 'frequency' analysis," which invalidates "any legislative-prayer prac-

tice that, from the vantage point of the prayers' listeners, has resulted in too large a proportion of sectarian invocations from one particular religious group," is foreign to the Ninth Circuit. *Rubin*, 2013 WL 1198095, at *7.

Respondents attempt to minimize the conflict between the Ninth Circuit and the Second and Fourth Circuits by ignoring the portion of *Rubin* that conflicts with the decision below. *Rubin* was not, as Respondents contend, about whether the government had "'taken every feasible precaution'" to "'ensure its own evenhandedness.'" Opp. 20 (quoting *Rubin*, 2013 WL 1198095, at * 9). Rather the question was whether a government that had adopted a neutral prayer-giver selection policy could nonetheless violate the Establishment Clause if "as it happens, most of the volunteers [are] Christian and [give] Christian invocations." 2013 WL 1198095, at *10.

According to *Rubin*, the answer is "no." Focusing on the prayers' content and the prayer-givers' religion "misconceives the focus" of the inquiry because "[w]hatever the content of the prayers or the denominations of the prayer-givers, the [government] chooses neither." *Id.* That the facially neutral policy produced predominantly Christian prayers and prayer-givers was an immaterial "function of local demographics" and the choices of private parties who responded to the government's invitation to pray. *Id.* (internal quotation marks omitted).

The court below reached the opposite conclusion. Like the Ninth Circuit, the Second Circuit confronted a facially neutral prayer-giver selection policy, expressly finding "no evidence" that the Town would not "have accepted any and all volunteers who asked to give the prayer." Pet. App. 20a. Unlike the Ninth

Circuit, however, the Second Circuit held that the Town had affiliated itself with Christianity by failing "to consider how its prayer practice would be perceived by those who attended Town Board meetings" and by failing to do more to diversify the religious identities of its prayer-givers when its facially neutral policy produced a "steady drumbeat" of what the court called "sectarian Christian prayers." *Id.* at 22a.

Grasping for ways to harmonize the cases, Respondents distort the holding below, claiming that it was not the "homogeneity of viewpoints reflected by the invocations that doomed the Town's practice," (Opp. 22 (internal quotation marks omitted)), but rather the Town's process for selecting prayer-givers, the lack of any disclaimers, and actions by Town officials conveying the impression that prayer-givers spoke on the Town's behalf. *Id.* at 22-23; *see also id.* at 16-17.

Respondents' claim that the case below turned on these factors is revisionist history. The Second Circuit stated that "a municipality cannot . . . ensure that its prayer practice [is constitutional] simply by stating, expressly, that it does not mean to affiliate itself with any particular faith." Pet. App. 24a. Neither could it satisfy the Constitution by adopting a lottery to select prayer-givers, nor even by actively pursuing prayer givers of minority faiths. *Id.* at 24a-25a.[1] Moreover, the Second Circuit did not question the facial neutrality of the Town's prayer selection

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[1] The Second Circuit went so far as to assert that there may be no constitutional means of selecting prayer-givers "where a town is so much of one creed that even such [random or inclusive] approaches would . . . nonetheless yield prayer-givers overwhelmingly of that creed." Pet. App. 25a n.9.

process; rather, the problem was that it did not "*resul[t]* in a perspective that [was] substantially neutral *amongst creeds*." *Id.* at 20a (emphases added). *Rubin* rejected this exact inquiry. 2013 WL 1198095, at *10.

To be sure, the court below said that by denominating prayer givers as Town chaplains and by participating in prayers, Town officials contributed to the impression that prayer-givers spoke on the Town's behalf.[2] But the *reason* the Second Circuit thought those factors relevant was because of the message they potentially conveyed to listeners, not because they illuminated the "government's reasons" for adopting the prayer practice. *Cf. Rubin*, 2013 WL 1198095, at *8. Indeed, the Second Circuit found no basis to question the legitimacy of the Town's reasons for adopting its prayer practice. Ultimately, Respondents cannot conceal the reality that the Second Circuit invalidated the Town's practice using a legal standard rejected by the Ninth Circuit. Whereas the government's purpose in adopting a particular prayer practice is dispositive in the Ninth Circuit, the Second Circuit invalidates prayer practices in which "one creed dominates others—*regardless of a town's intentions*." Pet. App. 22a. (emphasis added).

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[2] Respondents erroneously assert that the opinion below faulted the Town for "denominating *Christian* prayer-givers as Town chaplains." Opp. 23 (emphasis added). The Second Circuit made no such distinction. *See* Pet. App. 23a. Respondents further distort the record, alleging that the Town selectively bestowed the title of "Chaplain of the Month" on Christian prayer-givers. Opp. i. The record, however, shows that after September 2005, that phrase was usually not used for any prayer-givers. *See* Galloway Summ. J. Exs. 578-629. Moreover, nothing in the court of appeal's decision turns on this alleged fact.

Respondents also cannot hide the preexisting circuit conflict between the Eleventh Circuit's decision in *Pelphrey* and the Second and Fourth Circuits. Like the Ninth Circuit, the Eleventh Circuit faithfully applies *Marsh*, makes no reference to the supposed message a particular prayer practice conveys, and holds that legislative prayer practices are constitutional absent an indication that "the legislative prayers have been exploited to advance one faith." *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1271 (11th Cir. 2008). The Eleventh Circuit recently affirmed this analysis in *Atheists of Florida, Inc. v. City of Lakeland*, upholding a prayer practice upon finding no evidence "that [the government] attempted to exploit the prayer opportunity to proselytize or advance or disparage any one faith or belief." No. 12-11613, 2013 WL 1197772, at *14 (11th Cir. Mar. 26, 2013).

Respondents deny the existence of this conflict, arguing that the Eleventh Circuit, like the Second and Fourth, employs a totality of the circumstances approach that weighs "all of the factors that comprised the practice." Opp. 12 (internal quotation marks and emphasis omitted). Not so. The Eleventh Circuit adheres to *Marsh*, which it explained examines "the chaplain's religious affiliation, his tenure, and the overall nature of his prayers" only *for the purpose of* determining "whether the legislative prayers [have] been exploited" to advance a religious agenda. *Pelphrey*, 547 F.3d at 1270, 1278; *see also Lakeland*, 2013 WL 1197772. Unlike the Second and Fourth Circuits, neither the Eleventh nor the Ninth Circuit employs a freewheeling "totality of the circumstances" approach that asks whether "a reasonable objective observer" might conceivably believe that any aspects of a prayer practice conveyed an en-

dorsement of a particular religion. Pet. App. 26a; *see Joyner*, 653 F.3d at 354-55.

Respondents also err in arguing that the circuits' differing results stem from "material factual differences" rather than "a conflict in legal principle." Opp. 15. Their argument rests on facts that played no role in the courts of appeals' decisions. *Id.* at 15-18 (citing district court opinions, pleadings, and record evidence). On the facts actually relied on by the courts of appeals, *Pelphrey* and the case below are substantively indistinguishable: Each addressed (i) facially neutral prayer practices (ii) involving uncensored prayers (iii) delivered by private volunteers that (iv) produced prayer-givers that were primarily Christian and prayers that more often than not contained Christian content. Pet. 13-14 (cataloging similarities). The courts of appeals reached opposite conclusions not because of factual distinctions but because they applied different legal tests.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS

Respondents also attempt to portray this Court's precedents as "harmonious" and the decision below as "faithful to all of" them. Opp. 25. But the Second Circuit relied on its perception of tension between *Marsh* and dicta from *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), as its justification for adopting a legal standard that is at odds both with *Marsh* and with the balance of this Court's Establishment Clause cases.

The court below acknowledged that *Marsh* prohibits legislative prayer only where "'the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or be-

lief.'" Pet. App. 12a (quoting *Marsh*, 463 U.S. at 794-95). The court further conceded that "[t]he prayers in the record were not offensive in the way identified as problematic in *Marsh*: they did not preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like." *Id.* at 21a. Nonetheless, the court concluded that, "in light of *Allegheny*," (*Id.* at 20a-21a n.6), the Town's prayers were unconstitutional because "most of the prayers . . . contained uniquely Christian references" and "prayers devoid of such references almost never employed references unique to some other faith." *Id.* at 20a. In the Second Circuit's view, even absent evidence of exploitation, legislative prayers may be held unconstitutional if a reasonable observer could conclude that they contained too many Christian references. This approach (Pet. App. 21a-22a) is foreign to the standard enunciated in *Marsh*.

Respondents read *Marsh* as permitting only those prayer practices that are "truly even-handed," such as those that "involve[] random scheduling processes" or "affirmative[] disclaim[ers]." Opp. 17. But in *Marsh*, the prayers were all delivered by a paid Presbyterian minister who had served for sixteen years as legislative chaplain and whose prayers were "often explicitly Christian." *Marsh*, 463 U.S. at 793 & n.14. There was no random scheduling, no affirmative disclaimer, and no variation in the prayers' sectarian content until one year after the lawsuit commenced. Yet the Nebraska legislature's prayer practice was deemed constitutional because there was no evidence that the state exploited the prayer opportunity to proselytize, or to advance or disparage a particular faith. *See id.* at 794-95. That approach differs markedly from the test adopted by the court below, under which even municipalities "with the

best of motives may still have trouble preventing the appearance of religious affiliation" under an observer-based effects test. Pet. App. 26a-27a; *cf. Marsh*, 463 U.S. at 786 (declining to apply effects-based *Lemon* test). The court of appeals' (and Respondents') narrow view of permissible prayer practices turns the *Marsh* presumption of constitutionality on its head; *Marsh* itself would have been decided differently under their test.

Respondents also err in arguing that "no circuit has perceived the conflict that [P]etitioner posits" between *Marsh* and *Allegheny*. Opp. 28-29. To the contrary, the decision below stated that "[v]arious circuit court decisions, drawing on the Court's language in *Allegheny*, have questioned the validity of all forms of 'sectarian' prayers." Pet. App. 14a. Indeed, the Fourth and Seventh Circuits have concluded "that the Supreme Court's opinion in *Allegheny* 'read *Marsh* as precluding sectarian prayer.'" *Joyner*, 653 F.3d at 352 (quoting *Hinrichs v. Bosma*, 440 F.3d 393, 399 (7th Cir. 2006)). The decision below disagreed with these cases "[t]o the extent that" they "preclude[] all legislative invocations that are denominational in nature," but concluded that, "in light of *Allegheny*," courts may consider "the substance of the prayers under challenge." Pet. App. 15a, 21a n.6. On the other end of the spectrum, the Ninth Circuit recently held that *Allegheny* "did not—because, in dicta, it *could* not—supplant *Marsh* or restrict its scope." *Rubin*, 2013 WL 1198095, at *6. The perceived tension between *Marsh* and *Allegheny*, in brief, has led to considerable disagreement about the extent to which courts can police the content of legislative prayers.

That confusion persists despite this Court's unequivocal statement in *Lee v. Weisman*, 505 U.S. 577 (1992), that "it is no part of the business of government to compose official prayers." *Id.* at 589 (internal quotation marks omitted). Because Respondents read *Marsh* and *Allegheny* to permit the government to purge explicitly denominational content from legislative prayers, they conclude that it is "illogical to assert that *Lee* bars government officials from crafting the prayers"—so long as they proceed with a "light touch." Opp. 27. The frightening prospect of state officers acting as official censors of prayers delivered voluntarily by private citizens (or even paid chaplains) has no basis in this Nation's traditions or this Court's jurisprudence. *See Lee*, 505 U.S. at 592; *Engel v. Vitale*, 370 U.S. 421, 430 (1962). This Court should grant certiorari to reaffirm this country's "unambiguous and unbroken history" of legislative prayer. *Marsh*, 463 U.S. at 792.[3]

III. THE PETITION PRESENTS A QUESTION OF NATIONWIDE IMPORTANCE

The question presented is one of nationwide importance. The Second Circuit's own words—warning that the difficulties associated with crafting a prayer practice that passes its test "may well prompt municipalities to pause and think carefully before adopting legislative prayer"—confirm the breadth of its potential ramifications. Pet. App. 27a.

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[3] Respondents make no attempt to rebut Petitioner's showing that the decision below conflicts with this Court's limited public forum jurisprudence. Instead, they argue only that the question is not preserved. Opp. 29. But Petitioner pressed this claim before the Second Circuit, Pet. C.A. 39 n.16, and it is therefore properly presented.

Respondents contend that the Second Circuit's decision says nothing about the constitutionality of the prayer practice used in the U.S. House of Representatives. But as they see it—and as the Second Circuit's test declares—that question turns on whether non-Christian guest clergy routinely deliver prayers, whether the percentage of prayers with sectarian references—however defined—falls below some unspecified threshold, and whether Members of Congress ever participate in the prayers offered. Opp. 32-33.

None of those things matters under *Marsh*, however, which held that the constitutionality of facially neutral legislative prayer practices turns on the government's motives and should be easy to determine. And for decades it was. *See* Pet. 26-27. That changed with the Fourth Circuit's adoption of an observer-based standard in 2004. *See Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004). Today, notwithstanding *Marsh*, the "reasonable-observer" test that reigns in the Second and Fourth Circuits means that everything is up for grabs. Indeed, the Second Circuit admits that its test can "give only limited guidance to municipalities that wish to maintain a legislative prayer practice." Pet. App. 24a. Given this candor, it is not surprising that one state senate has abandoned legislative prayer entirely and that the prayer practices of at least six municipalities have recently been attacked in five different circuits. Pet. 26-27 & n.6.

Legislatures deserve clarity about whether daily conduct that is deeply rooted in their history is unconstitutional. With the circuits in disarray, only

this Court can provide that certainty. Further review is warranted.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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April 23, 2013

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[4] Respondents argue that the Court should deny the petition because the district court has not yet had an opportunity to fashion an appropriate injunction. Opp. 35-36. The question that has divided the circuits involves the legal test for judging the constitutionality of legislative-prayer practices, and that question has been finally resolved by the decision below. Nothing about the remedial proceedings will affect the rule of liability adopted by the Second Circuit or change the scope of the existing circuit conflict.

AMICUS CURIAE BRIEF

No. 12-696

In the Supreme Court of the United States

TOWN OF GREECE, NEW YORK,
Petitioner,

v.

SUSAN GALLOWAY, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* DR. MARK L. BAILEY; DR. DARRELL L. BOCK; DR. C. STEPHEN EVANS; DR. WAYNE GRUDEM; DR. H. WAYNE HOUSE; DR. PETER A. LILLBACK; DR. R. ALBERT MOHLER, JR.; FR. RAY RYLAND; AND J. MICHAEL THIGPEN IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are theologians and scholars, who are concerned about the argument made by Appellees (Plaintiffs below) at the district court and accepted by the Fourth Circuit in *Joyner v. Forsyth County, NC,* 653 F.3d 341 (4th Cir. 2011); the Seventh Circuit in *Hinrichs v. Bosma,* 440 F.3d 393 (7th Cir. 2006); and the Tenth Circuit in *Snyder v. Murray City Corp.,* 159 F.3d 1227 (10th Cir. 1998) that only religiously "neutral" prayers should be permitted as a legislative invocation. *Amici Curiae* assert that there can be no such thing as a religiously "neutral" prayer and that attempts to establish a standard for a religiously "neutral" prayer are contrary to the very concept of prayer and require that the judiciary become arbiters of a state orthodoxy—a task for which any governmental entity is ill suited. *Amici Curiae* believe that the Court should grant Appellant's petition in order to make clear that the Religion Clauses of the First Amendment do not require legislative invocations to be religiously "neutral" prayers.

Dr. Mark L. Bailey is President of Dallas Theological Seminary and Professor of Bible Exposition. Dr. Bailey received his Bachelor of Arts

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[1] All parties of record were timely notified 10 days prior to *Amici*'s intent to file this brief as required by Supreme Court Rule 37.2 and consented to the filing of this *amicus* brief or consented to the filing of *amicus* briefs in support of either or neither party. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

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SUMMARY OF THE ARGUMENT

In *Marsh v. Chambers,* this Court affirmed the constitutionality of legislative invocations and held that courts cannot parse the content of an invocation unless the invocation opportunity has been exploited to proselytize or disparage. Moreover, this Court, in *Lee v. Weisman,* noted that regulating a prayer's content violates the Establishment Clause by imposing a "civic" orthodoxy of neutrality in which judges would determine the terms and phrases that may or may not be used to refer to deities and even which deities may be addressed. This judicially-arbitrated civic orthodoxy would require that the civil courts decide theological matters, adopt standards of which religious beliefs are "neutral," and establish some terms or deities as prohibited and others as favored—a task that courts have found impossible in practice to perform. Furthermore, courts that impose religious "neutrality" categorically exclude certain religions that require the use of those prohibited terms and violate the mandate of the Establishment Clause that all persons be treated equally by the government, regardless of religious creed. The Second Circuit, below, recognized these problems with the imposition of religious "neutrality" but then proceeded to parse the content of the Town of Greece's prayers and to demand that the Town of Greece either impose just such a state orthodoxy of "neutrality" or manufacture the perception of diversity. The only way to prevent the establishment of a civic orthodoxy—and a gross violation of the Establishment Clause—is to avoid judicial evaluation of the content of any invocation, allowing each person to offer an invocation according to the dictates of conscience. To avoid this violation of the Establishment Clause, the

Court should grant certiorari and reinforce the freedom to pray according to the dictates of conscience that is inherent in this Court's opinion in *Marsh v. Chambers*.

ARGUMENT

I. For a court to determine that a prayer is religiously "neutral,"[2] it must consider the content of the prayer and compare it with a state-established orthodoxy of neutrality.

This Court has long held that the judiciary is not competent to decide theological matters. *See, e.g., Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church,* 393 U.S. 440, 445–46 (1969) ("[I]t [is] wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions."). In *Marsh v. Chambers,* this Court recognized the danger of judicial intrusion into prayer and declared, "The content of the prayer is not

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[2] To avoid confusion regarding whether the terms "sectarian" and "nonsectarian" refer to prayers that are or are not religiously "neutral" or, instead, to one sect or denomination of a religion and because the term "sectarian" has a negative connotation, this Brief avoids these terms to characterize religious content. *See, e.g., Marsh v. Chambers,* 463 U.S. 783, 793 n.14 (1983) (noting that Rev. Palmer characterized his prayers as "nonsectarian" and "Judeo Christian" and describing some of Rev. Palmer's prayers as "explicitly Christian"); *Colo.o Christian Univ. v. Weaver,* 534 F.3d 1245, 1258 n.5 (10th Cir. 2008) ("We recognize that the term 'sectarian' imparts a negative connotation. *See Funk & Wagnalls New International Dictionary of the English Language* 1137 (comp. ed. 1987) (defining 'sectarian' as meaning '[p]ertaining to a sect; bigoted.').").

of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." *Marsh,* 463 U.S. at 794–95. Thus, while it is permissible for courts to consider whether an opportunity for legislative prayer is disparaging or proselytizing, they are prohibited from considering the theological nature of the prayer. Furthermore, this Court in *Lee v. Weisman* noted that the government's requiring religiously "neutral" prayers would be tantamount to "compos[ing] official prayers." *Lee v. Weisman,* 505 U.S. 577, 588 (1992) (quoting *Engel v. Vitale,* 370 U.S. 421, 425 (1962)).

The judiciary is not qualified to decide theological questions. An understanding of American legal theory does not qualify a judge to render opinions on the theology and beliefs of adherents to hundreds of different faiths and sects. As Justice Souter wrote, "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible" than "comparative theology." *Lee,* 505 U.S. at 616–17 (Souter, J., concurring).

Furthermore, requiring that prayers be religiously "neutral" logically necessitates that a judicially-sanctioned "civic" religion be established. Such an approach would require judges to determine what terms and phrases may or may not be used to refer to God. Judges would become the arbiters of a new orthodoxy of "neutrality," setting standards by which

deities may be addressed in public prayers. This Court in *Lee v. Weisman* observed, "[Our] precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted." *Lee*, 505 U.S., at 590.

The establishment of a "neutral" orthodoxy, administered by the judiciary, would be a violation of the Establishment Clause far more egregious than the perceived harm sought to be attenuated. "A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Id.* at 592.

The establishment of a "neutral" orthodoxy would also necessitate that the courts establish some religions or some religious terms as more favored than others. For example, in *Hinrichs v. Bosma,* a district court in the Seventh Circuit found that "[p]rayers are sectarian ... when they proclaim or otherwise communicate the beliefs that Jesus of Nazareth was the Christ, the Messiah, the Son of God, or the Savior, or that he was resurrected, or that he will return on Judgment Day or is otherwise divine," but prayers are not sectarian if "a Muslim imam [offered] a prayer addressed to 'Allah.'" *Hinrichs v. Bosma,* No. 1:05-cv-0813-DFH-TAB, 2005 U.S. Dist. LEXIS 38330 (S.D. Ind. Dec. 28, 2005) (order denying a motion to stay).

Likewise, in *Pelphrey v. Cobb County*, the Eleventh Circuit noted that even in that one case, the handful of plaintiffs and their counsel could not agree upon which religious terms are neutral and which are not. That court observed:

> We would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions, and the [plaintiffs] have been opaque in explaining that standard. Even the individual [plaintiffs] cannot agree on which expressions are "sectarian." Bats, one of the [plaintiffs], testified that a prohibition of "sectarian" references would preclude the use of "father," "Allah," and "Zoraster" but would allow "God" and "Jehovah." Selman, another [plaintiff], testified, "[Y]ou can't say Jesus, ... Jehovah, ... [or] Wicca. ..." Selman also deemed "lord or father" impermissible.
>
> The [plaintiffs'] counsel fared no better than his clients in providing a consistent and workable definition of sectarian expressions. In the district court, counsel for the [plaintiffs] deemed "Heavenly Father" and "Lord" nonsectarian, even though his clients testified to the contrary. At the hearing for oral arguments before this Court, the [plaintiffs'] counsel asserted two standards to determine when references are impermissibly "sectarian." ... Counsel had difficulty applying either standard to various religious expressions. When asked, for example, whether "King of kings" was sectarian, he replied, "King of kings may be a tough one. ... It is arguably a reference to one God. ... I think

> it is safe to conclude that it might not be sectarian."

Pelphrey v. Cobb Cnty., 547 F.3d 1263, 1272 (11th Cir. 2008). The Eleventh Circuit went on to explain that parsing the terms used in every prayer at legislative assemblies of every level would lead to judicial chaos. *Id.* As that court wryly noted, "Whether invocations of 'Lord of lords' or 'the God of Abraham, Isaac, and Mohammed' are 'sectarian' is best left to theologians, not courts of law." *Id.* at 1267.

II. Every prayer adopts particular religious beliefs and is therefore not religiously "neutral."

Not only would parsing the content of legislative prayers lead to the establishment of a state orthodoxy, because every prayer adopts or presupposes particular religious beliefs, this orthodoxy would necessarily favor some religions and offend others. As one law review article observes:

> Not all religions are monotheistic. For religions involving multiple gods and/or goddesses, a rule requiring that the prayer giver refrain from naming a deity precludes the offering of a prayer in their normal faith tradition. Second, there are Christian denominations whose doctrinal statements require that prayers invoke the name of Jesus Christ. ...
>
> A rule prohibiting the naming of a particular deity, then, categorically excludes certain religions, and in so doing violates the

> Establishment Clause. If the Establishment Clause prohibits the government from doing anything, it prohibits categorically barring the adherents of certain faiths from participating in public events on equal terms with followers of other religions. The government cannot make violating any citizen's religious faith a condition precedent to equal treatment.

Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 Georgetown J.L. & Pub. Pol'y 219, 254–55 (2008).

Even a prayer as simple as "God save this honorable court" makes specific religious statements that are in accord with some religious beliefs and in discord with others. This brief prayer, far from being religiously "neutral," presupposes one, personal deity who hears and responds to prayer, who intervenes in history, and who has the power to "save this honorable court." These presuppositions are rejected by polytheistic beliefs, which believe in gods instead of God; by deistic beliefs, which reject the idea that God intervenes in history or responds to prayer; and by atheistic beliefs, which reject the existence of a god or gods altogether.

The Seventh Circuit reached the issues inherent in attempting to understand any prayer as "neutral" in *Kerr v. Farrey:*

> The district court thought that the [Narcotics Anonymous] program escaped the "religious" label because the twelve steps used phrases like "God, as we understood Him," and because the

> warden indicated that the concept of God could include the non-religious idea of willpower within the individual. We are unable to agree with this interpretation. A straightforward reading of the twelve steps shows clearly that the steps are based on the monotheistic idea of a single God or Supreme Being. True, that God might be known as Allah to some, or YHWH to others, of the Holy Trinity to still others, but the twelve steps consistently refer to "God, as we understood Him." Even if we expanded the steps to include polytheistic ideals, or animalistic philosophies, they are still fundamentally based on a religious concept of a Higher Power. ... Because that is true, the program runs afoul of the prohibition against the state's favoring religion in general over non-religion.

Kerr v. Farrey, 95 F.3d 472, 479–80 (7th Cir. 1996).

Theistic presuppositions also conflict with certain forms of Buddhism. As one religious scholar noted,

> [T]wo varieties at least of Buddhism are very different from theism: the Theravada and Madhyamika, one of the mainstream forms of Mahayana Buddhism. It was not for nothing that the Dalai Lama declared ... "We Buddhists are atheists."
>
> ... [Buddhism] has deep spiritual books and philosophies. But it is still atheist: it rejects the notion of a creator God who will help out with our troubles.

Ninian Smart, *Dimensions of the Sacred: An Anatomy of the World's Beliefs* 27 (1996).

The distinction between monotheistic religious beliefs and other religious beliefs undermines the idea that references to "God" in the generic do not "advance" one form of religious belief or "disparage" another. Indeed, with the multitude of religious beliefs in the United States, it is impossible to craft any prayer that comports with the fundamental beliefs of them all. Demanding that legislative invocations be of this fictional "neutral" form is to ban them altogether or to adopt a state orthodoxy of "neutrality."

Finally, forcing prayer, rich with theological meaning as each prayer is, to comport with a state orthodoxy of "neutrality" discriminates against those whose religious beliefs require them to pray in a manner inconsistent with that "neutrality." If praying "in Jesus' name" is prohibited, then those who believe they must pray "in Jesus' name" are effectively prohibited from being able to participate in a legislative prayer because their religious views conflict with those of the state. As this Court said in *Lee v. Weisman,* "It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights or benefits as the price of resisting conformance to state-sponsored religious practice." *Lee*, 505 U.S. at 596.

CONCLUSION

Ultimately, attempts to promote "civic religion" or "religious neutrality" must establish the judiciary as the arbiters of the "neutral" orthodoxy. This orthodoxy would necessarily favor some religions over others. The

only way to avoid this establishment of religion and to remain truly neutral is to follow the guidance of *Marsh*: refusing to consider the content of any prayer and permitting each person to pray according to the dictates of conscience. Unfortunately, the Fourth Circuit Court of Appeals in *Joyner v. Forsyth County, NC*, the Seventh Circuit Court of Appeals in *Hinrichs v. Bosma,* and the Tenth Circuit Court of Appeals in *Snyder v. Murray City Corp.* rejected this principle and instead established a civic orthodoxy. The Eleventh Circuit Court of Appeals, however, recognizing the threat to religious liberty described herein, adopted this principle of freedom of conscience in *Pelphrey v. Cobb County*. In its decision below, the Second Circuit Court of Appeals recognized the threat to religious liberty posed by judging the content of prayers but then proceeded to do precisely that, mandating that the Town of Greece either impose a state orthodoxy of "neutrality" or manufacture the perception of diversity. What was not permitted was to simply allow persons wishing to pray to do so according to the dictates of their own consciences without regard to the content of their prayers. To resolve this fundamental conflict in the courts regarding the nature of religious liberty and freedom of conscience, the Court should grant certiorari and reinforce the freedom to pray according to the dictates of conscience that is inherent in this Court's opinion in *Marsh v. Chambers*.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE,
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SUSAN GALLOWAY AND LINDA STEPHENS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE STATES OF INDIANA, ALABAMA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, IDAHO, KANSAS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEW MEXICO, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

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INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Alabama, Arizona, Arkansas, Colorado, Florida, Idaho, Kansas, Michigan, Mississippi, Montana, Nebraska, New Mexico, Oklahoma, South Carolina, Texas, Utah, and Virginia respectfully submit this brief as *amici curiae* in support of the Petitioner. The longstanding tradition of opening each legislative session day with a prayer is followed, to some degree, in all 50 states. As the Court is aware, offended citizens bring lawsuits challenging such legislative prayers with some frequency, and the states are often called upon to defend the prayer practices of their legislatures, localities, and subdivisions. *See, e.g.*, *Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011) (challenging prayer practice of county board of commissioners); *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008) (challenging prayer practices of county commission and county planning commission); *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006) (challenging prayer practice of the Indiana House of Representatives).

These lawsuits are particularly burdensome because public officials cannot reliably predict their

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[1] Pursuant to Supreme Court Rule 37.2(a), the *amici* states provided all parties' counsel of record with timely notice of their intent to file this brief. Consent of the parties is not required for the states to file an amicus brief. Sup. Ct. R. 37.4.

outcomes based on precedents from this or any other court. Indeed, the lower courts are intractably divided over whether legislative prayer should be analyzed under the historical test of *Marsh v. Chambers*, 463 U.S. 783 (1983), or the endorsement test of *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). The states therefore have a compelling interest in obtaining clearer guidance from this Court regarding the permissible bounds of legislative prayer.

SUMMARY OF THE ARGUMENT

Nearly thirty years ago, in *Marsh v. Chambers*, 463 U.S. 783 (1983), this Court upheld the practice of legislative prayer based on its "unambiguous and unbroken history of more than 200 years"—a history that has made legislative prayer "part of the fabric of our society." *Id.* at 792. For many years after *Marsh* was decided, legislative prayer appeared to be a settled issue, free from the uncertainty and confusion that characterizes Establishment Clause jurisprudence more generally.

In recent years, however, lower courts have begun to apply *Marsh* in ways that cast doubt on this certainty. The Second and Fourth Circuits have read dictum from this Court's subsequent decision in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), as modifying *Marsh* such that the earlier case's straightforward, history-

based analysis no longer applies. Instead, these courts have applied an endorsement test that focuses on the precise content of the challenged prayers. *See* Pet. App. 19a-24a; *Joyner v. Forsyth County*, 653 F.3d 341, 348-49 (4th Cir. 2011).

The fact-bound nature of the inquiries mandated by these decisions is at odds with this Court's broad approval of legislative prayer in *Marsh*. Moreover, these decisions give very little guidance to states and localities that wish to avoid costly and burdensome litigation over the prayers that traditionally begin each legislative or council session. As all 50 states practice legislative prayer to some degree—and many states have prayer practices closely resembling the practice struck down in the decision below—it is important that the Court address the growing split over this issue before it becomes yet another irredeemably muddled sector of Establishment Clause doctrine.

As Indiana's own experience with legislative prayer litigation demonstrates, the lack of clarity in this area is especially troubling to the extent it leaves courts to delve into questions "best left to theologians, not courts of law." *Pelphrey v. Cobb County*, 547 F.3d 1263, 1267 (11th Cir. 2008). In *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1131 (S.D. Ind. 2005), *stay of injunction pending appeal denied*, 440 F.3d 393 (7th Cir. 2006), *injunction vacated on standing grounds*, 506 F.3d 584 (7th Cir. 2007), the

district court enjoined the Speaker of the Indiana House of Representatives from allowing "sectarian prayers," but gave little definition as to what might render a prayer "sectarian." Indeed, with its focus on the unconstitutionality of pervasively Christian prayers, the *Hinrichs* injunction—ephemeral though it was—could have been read as to prohibit express references to Christianity but to permit invocations of the deities of other religions. Such a result is not contemplated by *Marsh*, which recognized that the "invo[cation of] Divine guidance on a public body entrusted with making the laws . . . is simply a tolerable acknowledgement of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792.

ARGUMENT

I. The Longstanding Tradition of State Legislative Prayer Is Jeopardized by Growing Confusion Regarding the Correct Standard to Apply When Prayer Practices Are Challenged

1. The practice of opening legislative assemblies with an invocation is "deeply embedded in the history and tradition of this country." *Marsh v. Chambers*, 463 U.S. 783, 786 (1983). The American tradition of legislative prayer is derived from the practices of both houses of the British Parliament, which, since the 16th Century, have begun every

session with a prayer. Martin Lanouette, *Prayer in the Legislature: Tradition Meets Secularization*, Can. Parl. Rev. 2, 2 (2009). This custom followed British colonists as they established Anglophone nations around the world. *Id.* at 2-7.[2] Thus, by the time of the Founding, the practice of legislative prayer was so far removed from the controversy that marks it today, that the First Congress enacted a law providing for the appointment of paid congressional chaplains the same week it finalized the language of the First Amendment. Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 71; *Marsh*, 463 U.S. at 788 ("Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment[.]"). The practice of opening daily congressional sessions with a prayer has continued without interruption since that time. *Marsh*, 463 U.S. at 788.

Following Congress's lead, state legislatures adopted their own prayer practices, most of which are still going strong today. *Id.* at 788-89 & n.11. In 2002, the National Conference of State Legislatures—a bipartisan organization serving the

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[2] Australia, New Zealand, and Canada, during their respective founding periods, all solemnized their legislative assemblies with an opening prayer. Lanouette, *supra*, at 2. This practice continues today in Australia, New Zealand, and all Canadian provinces except Quebec. *Id.*

legislators and staffs of the nation's states, commonwealths, and territories—conducted a comprehensive survey on the topic of legislative prayer. *See* National Conference of State Legislatures, *Prayer Practices, Inside the Legislative Process* 5-145 (rev. ed. Sept. 2009), *available at* http://www.ncsl.org/documents/legismgt/ILP/02Tab5Pt7.pdf [hereinafter "NCSL Survey"].[3] The NCSL Survey found that "[a]lmost all state legislatures still use an opening prayer as part of their tradition and procedure[.]" *Id.*

Legislative bodies from 48 states, the Commonwealth of Puerto Rico, and the territory of American Samoa responded to the survey and affirmed that they open each legislative session day with a prayer. *Id.* at 5-148, Table 02-5.50. With one exception—the Hawaii Senate voted to discontinue its prayer practice in 2011, *see* Mark Niesse, *Hawaii Senate Ends Daily Chamber Prayers*, Associated Press, Jan. 21, 2011—these results remain unchanged today. Additionally, the legislatures of the two states that did not respond to the NCSL Survey—New York and South Carolina—currently open their session days with a prayer. *See* New York

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[3] *See also* National Conference of State Legislatures, *Inside the Legislative Process: Background*, http://www.ncsl.org/legislatures-elections/legislatures/inside-the-legislative-process.aspx# (last visited Jan. 4, 2013) (explaining that the legislative prayer survey was conducted in 2002 and has appeared in all subsequent editions of *Inside the Legislative Process*).

House Rule VI, § 2(b); New York Senate Rule IX, § 4(a); South Carolina House Rule 6.3; South Carolina Senate Rule 32A.

Based on the results of the NCSL Survey, it is fair to conclude that Petitioner Town of Greece's prayer practices are well within the norm. Under the Town's prayer policy, any citizen of any faith may volunteer to give the opening prayer before a Town Board meeting. Pet. App. 4a. If there are no volunteers, the Town invites clergy from religious communities within the town, working through a periodically updated list of religious organizations published by the Greece Chamber of Commerce. Pet. App. 5a. Once a prayer-giver volunteers or is chosen, that person is free to choose the invocation. Pet. App. 4a. The Town has no guidelines concerning content of the prayers and does not review the prayers before their delivery. Pet. App. 4a.

These policies are consistent with the practices of many states, the majority of which utilize visiting chaplains of various faiths whose prayers are not screened or subjected to any content restrictions prior to delivery. According to the NCSL Survey, in 44 states a visiting chaplain delivered the opening prayer at least some of the time.[4] NCSL Survey,

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[4] Opening prayers in these states are also sometimes delivered by an official legislative chaplain, a member of the legislative

supra, at 5-151 to -152, Table 02-5.52. Of these, nine states and Puerto Rico utilized visiting chaplains exclusively. *Id.* In 30 states, American Samoa, and Puerto Rico, at least one legislative chamber did not have guidelines for the delivery of an opening prayer. *Id.* at 5-153, Table 02-5.53. In 16 of these 30 states, *neither* legislative chamber had guidelines. *Id.* Only three legislative chambers reviewed prayers before they were delivered: the Florida House, the Ohio House and the Puerto Rico House. *Id.* at 5-157, Table 02-5.55. Finally, in 42 states, American Samoa and Puerto Rico, at least one of the legislative chambers rotated its visiting chaplain invitation among different religions. *Id.* at 5-171, Table 02-5.63. In 21 of these, both chambers rotated the visiting chaplain invitation among different religions. *Id.*

2. The similarities between the prayer policy struck down in this case and the practices employed by many states demonstrate just how vulnerable state legislative prayer is under current Establishment Clause doctrine (or, more precisely, lower-court application of that doctrine). As the Town of Greece observes in its Petition, uncertainty among the lower courts as to the correct legal standard to apply in legislative prayer cases means that similar practices are being upheld or struck

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body, the clerk or secretary, or a legislative staff person. NCSL Survey, *supra*, at 5-151 to -152, Table 02-5.52.

down based solely on the jurisdiction in which a challenge is raised. Pet. 13.

While this kind of uncertainty has long plagued Establishment Clause doctrine generally, it is a relatively new development with respect to legislative prayer. After the Court upheld legislative prayer in *Marsh v. Chambers*, federal-court challenges to particular prayer practices were scarce for the next two decades.[5] This period of relative quiet on the legislative prayer front is unsurprising given the breadth of the Court's decision in *Marsh*, where it said that a legislative prayer practice will be upheld so long as (1) the choice of prayer-giver does not stem from any "impermissible motive" on the part of the legislative body, and (2) "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 793-95.

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[5] In *Snyder v. Murray City Corporation*, 159 F.3d 1227 (10th Cir. 1998) (*en banc*), the court relied on *Marsh* to uphold a city council's practice of inviting clergy to give prayers; in *Kurtz v. Baker*, 829 F.2d 1133 (D.C. Cir. 1987), the court dismissed on standing grounds a challenge to Congress's similar practice of inviting clergy to pray; and in *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999), the court struck down a public school board's prayer practice because it was more like school prayer than legislative prayer.

Since the mid-2000s, however, legislative prayer litigation has increased dramatically, as shown in a table of cases provided in an appendix to this brief at 1a. What is significant is both the number of cases (which shows a growing sense of opportunism for those who oppose legislative prayer) and the accompanying deterioration of doctrinal uniformity. Several lower courts—including the Second Circuit in the decision below, but also several others as the table shows—have begun to eschew *Marsh*'s straightforward historical analysis and to apply a different standard based on dictum from this Court's opinion in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), claiming that the prayers at issue in *Marsh* did not "have the effect of affiliating the government with any one specific faith or belief . . . because the particular chaplain had 'removed all references to Christ.'" *Id.* at 603 (quoting *Marsh*, 463 U.S. at 793 n.14).

For example, the Second Circuit here took that statement to modify *Marsh* such that legislative prayer is unconstitutional "[w]here the overwhelming predominance of prayers offered are associated, often in an explicitly sectarian way, with a particular creed, and where the [government] takes no steps to avoid the identification[.]" Pet. App. 26a. The court essentially adopted an endorsement test that asks whether the challenged prayer practice would convey to a "reasonable objective observer" the impression that

"[government] officials themselves identify with the sectarian prayers and that residents in attendance are expected to participate in them[.]" Pet. App. 26a.

The Fourth Circuit has likewise applied *Allegheny* to strike down legislative prayer in recent years, holding that such prayer is constitutional only if it is "nonsectarian in both policy and practice" and does not result in an "effective endorsement of one faith." *Joyner v. Forsyth County*, 653 F.3d 341, 348, 355 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012). The court explained that "[i]nfrequent references to specific deities, standing alone, do not suffice to make out a constitutional case." *Id.* at 349. "But legislative prayers that go further—prayers in a particular venue that repeatedly suggest the government has put its weight behind a particular faith—transgress the boundaries of the Establishment Clause." *Id.*

The Seventh Circuit has also indicated that it would apply an endorsement test should a legislative prayer case reach that court on the merits. In its only occasion to address the constitutionality of legislative prayer, the court denied the Indiana House Speaker's motion to stay an injunction against "sectarian" legislative prayers pending appeal. *Hinrichs v. Bosma*, 440 F.3d 393, 398-402 (7th Cir. 2006). Although noting the "tentative nature" of its analysis, the court stated that it read *Marsh* (as modified by *Allegheny*) "as hinging on the

nonsectarian nature of the invocations at issue there." *Id.* at 395, 399. Thus, said the court, the argument that the Indiana House's prayer practice was permissible under *Marsh*'s historical analysis was unlikely to prevail. *Id.* at 401.[6]

The list goes on. As the appendix to this brief indicates, other federal courts have in recent years taken this same approach of citing *Allegheny* and footnote 14 of *Marsh* as justification for examining in detail the content of the legislative prayers in question. *See* App. 1a-5a.

The Eleventh Circuit, on the other hand, has used *Marsh*'s historical test, refused to read *Allegheny* to permit only "nonsectarian" prayer, and refused to "parse" the content of prayers. In *Pelphrey v. Cobb County*, 547 F.3d 1263, 1271 (11th Cir. 2008) the court held that "courts are not to evaluate the content of [legislative] prayers absent evidence of exploitation" of the prayer opportunity because "*Allegheny* does not require that legislative prayer conform to the model in *Marsh*." *Id.* at 1271-72. Thus while the Second, Fourth, and Seventh Circuits looked to prayer *content* to determine whether the "prayer opportunity ha[d] been

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[6] The Seventh Circuit did ultimately reverse the district court's decision, but did so on standing grounds and did not reach the merits of the Establishment Clause issue. *See Hinrichs v. Speaker of the House of Representatives*, 506 F.3d 584, 585 (7th Cir. 2007).

exploited," *Marsh*, 463 U.S. at 794, the Eleventh Circuit examined the prayers' *context* and found there was no evidence of exploitation. *Pelphrey*, 547 F.3d at 1277 ("Although the majority of speakers were Christian, the parties agree that prayers were also offered by members of the Jewish, Unitarian, and Muslim faiths."); *id.* at 1278 ("Some prayers included references to 'Jesus Christ,' but others referenced 'Allah,' 'Mohammed,' and the Torah."). A number of other federal courts have followed this model in recent years as well. *See* App. 1a-5a.

These conflicting precedents leave state legislatures, localities, and subdivisions with very little guidance when it comes to crafting legislative prayer policies that comply with the Establishment Clause. As the Second Circuit acknowledged in the opinion below, this lack of guidance "may well prompt municipalities to pause and think carefully before adopting legislative prayer[.]" Pet. App. 27a. States with legislative prayer practices already in place may even consider abandoning those traditions in order to avoid costly and burdensome litigation. In fact, the Hawaii Senate recently did just that when faced with the threat of a lawsuit, thus becoming the first state legislative body in the nation to halt the practice of legislative prayer. Mark Niesse, *Hawaii Senate Ends Daily Chamber Prayers*, Associated Press, Jan. 21, 2011

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In sum, lower courts have recently undertaken misguided attempts to harmonize the Court's highly differentiated Establishment Clause precedents. As a consequence, yet another species of Establishment Clause doctrine—one that had seemingly been settled nearly 30 years ago—stands on the precipice of confusion, contradiction, and chaos.[7] The Court should grant the petition to prevent further cross-pollination of legislative prayer doctrine and clarify that the *Marsh* standard—not the *Allegheny* endorsement standard—remains the governing test.

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[7] A now-vacated Fifth Circuit panel decision enjoining a school board's prayer practice further illustrates the burgeoning confusion in this area. In *Doe v. Tangipahoa Parish School Board*, 473 F.3d 188 (5th Cir. 2006), three different judges used three different Establishment Clause analyses to arrive at three different conclusions. The lead opinion cited *Allegheny* and footnote 14 of *Marsh* as the basis for enjoining a school board's prayer practice; the concurring opinion held that school board prayer is more like school prayer than legislative prayer and therefore voted to enjoin the practice under *Lemon v. Kurtzman*, 403 U.S. 602 (1971); and the dissenting opinion applied *Marsh*'s deferential historical analysis in voting to uphold the practice. *Doe*, 473 F.3d at 199, 211-12. Ultimately, the panel decision was vacated on standing grounds. *See Doe v. Tangipahoa Parish School Bd.*, 494 F.3d 494 (5th Cir. 2007) (en banc).

II. Indiana's Experience in *Hinrichs v. Bosma* Demonstrates the Need for Clarification in This Area of the Law

As mentioned in Part I.2., *supra*, the prayer practice of the Indiana House of Representatives was challenged in 2005 in a lawsuit brought by four Indiana residents and taxpayers. In a decision whose analysis closely presaged that of the Second Circuit in this case, the United States District Court for the Southern District of Indiana held that the practice violated the Establishment Clause and issued a permanent injunction barring the Speaker of the House from permitting "sectarian" prayer as part of the official proceedings of the House. *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1131 (S.D. Ind. 2005). That holding, though ultimately overturned by the Seventh Circuit on standing grounds, *see Hinrichs v. Speaker of the House of Representatives*, 506 F.3d 584, 585 (7th Cir. 2007), is nonetheless instructive here as it demonstrates the creeping uncertainty that threatens to upend legislative prayer doctrine.

1. The Indiana House of Representatives, like Congress and the legislative chambers of many other states, has a long and rich tradition of legislative prayer. At the time of the *Hinrichs* lawsuit, the Indiana House had been opening each session day with a prayer for 188 years. *Hinrichs*, 400 F. Supp. 2d at 1105. It continues to do so today.

In the Indiana House, the invocation is frequently delivered by a religious cleric or, when none is available, by a Representative. *Id.* The cleric for a particular day is nominated by a Representative, who submits a nomination form to the Majority Caucus Chair, who, in turn, schedules the cleric to deliver the invocation. *Id.* Once scheduled, the cleric receives a confirmation letter by mail, which states in part: "The invocation is to be a short prayer asking for guidance and help in the matters that come before the members. We ask that you strive for an ecumenical prayer as our members, staff and constituents come from different faith backgrounds." *Id.* Neither the Speaker nor any other Representative or staff member gives the cleric any further guidance as to the content of the prayer. *Id.*

Fifty-three opening prayers were offered in the House during the 2005 legislative session. *Id.* at 1106. Of these, 41 were delivered by clergy from Christian churches, nine were delivered by Representatives, and one each was delivered by a lay person, a Muslim imam, and a Jewish rabbi. *Id.*

In analyzing the House's prayer practice under the Establishment Clause, then-District-Judge David Hamilton—since elevated to the Seventh Circuit—began with *Marsh*. He acknowledged *Marsh*'s history rationale, but ultimately found it

unpersuasive. As with the Second Circuit in the opinion below, Judge Hamilton seized on footnote 14 of the *Marsh* opinion, where this Court explained that the Nebraska chaplain "removed all references to Christ [from his prayers] after a 1980 complaint from a Jewish legislator." *Id.* at 1116 (citing *Marsh*, 463 U.S. at 793 n.14).

Judge Hamilton reasoned that this fact—combined with *Marsh*'s statement that courts should not examine the content of prayers "where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief," *Marsh*, 463 U.S. at 794-95—means that "expressly and consistently sectarian" prayers that "express the faith of a particular religion" violate the Establishment Clause. *Hinrichs*, 400 F. Supp. 2d at 1121-22. Foreshadowing the decision below, Judge Hamilton invoked *Allegheny* to support this reading of *Marsh*. *Id.* at 1117.

Judge Hamilton therefore parsed the content of the prayers given during the 2005 Indiana House session. He examined each of 45 available prayer transcripts from that session and found that "[a] substantial majority of the prayers were explicitly Christian, offered in the name of Jesus Christ or with similar phrasing. Several used repeated references to specifically Christian beliefs and doctrine, and some can fairly be described as

proselytizing efforts." *Id.* at 1126. Concluding that such Christian predominance equaled establishment under *Allegheny*, Judge Hamilton enjoined the Speaker of the Indiana House from allowing "sectarian prayers," including specifically prayers using "Christ's name or title or any other denominational appeal." *Id.* at 1131.

2. While his decision was ultimately vacated on standing grounds, Judge Hamilton's analysis in *Hinrichs* is useful because it underscores how much this Court's guidance is needed regarding legislative prayers.

To begin, Judge Hamilton, the court below, and the Fourth Circuit in *Joyner* have misunderstood footnote 14 of *Marsh*, supplemented by reference to dictum in *Allegheny*, to indicate that overtly Christian prayers are inherently proselytizing and therefore illegal. *See* Pet. App. 20a-21a; *Joyner*, 653 F.3d at 349-50; *Hinrichs*, 400 F. Supp. 2d at 1125-26. Yet, for the most part, the prayers giving rise to the lawsuit in *Marsh* were "explicitly Christian," and the Court made no limitation on the chaplain's ability to give Christian prayers. *Marsh*, 463 U.S. at 793-95 & n.14.

Furthermore, the long history of legislative prayer on which the Court relied in *Marsh* was filled with overtly Christian references. The Continental Congress "sprinkled its proceedings liberally with

the mention of God, Jesus Christ, [and] the Christian religion." Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 217 (1986); *see also* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2104 (1996) ("[F]rom America's earliest days to the present times, the prayers delivered by [congressional] chaplains have been true sacral prayers, and many of them, true Christian prayers. Indeed, within the last six years alone, over two hundred and fifty opening prayers delivered by congressional chaplains have included supplications to Jesus Christ.").

The congressional practice of invoking Jesus's name in institutional prayers has continued ever since, as a brief, periodic historical sampling shows. A representative prayer in 1861 asked "that the disorders of the land may be speedily healed . . . and that Thy Church and Kingdom may flourish in a larger peace and prosperity, for Thy Son, our Savior, Jesus Christ's sake. Amen." Cong. Globe, 37th Cong., 1st Sess. 1 (July 4, 1861). In 1904, the Senate chaplain asked God "in Christ's name" to help the nations "fulfill the whole law of Christ," and quoted Christian scripture: "Thou shall name Him Jesus the Saviour, for He shall save my people from their sins." Edward E. Hale, *Prayers Offered in the Senate of the United States in the Winter Session of 1904* 16, 31 (1904) (quoting Matthew 1:21). In 1947, Senate

Chaplain Peter Marshall asked the "Lord Jesus" to "put [His] arm around [the Senators] to give them strength," and concluded, "we humbly ask in Jesus' name." *The Prayers of Peter Marshall* 129 (1954).

In 1983, when *Marsh* was decided, several congressional prayers were offered in Jesus' name. *See, e.g., Prayers Offered by the Chaplain of the Senate of the United States—Reverend Richard C. Halverson*, Sen. Doc. 98-43, at 23 (1984) (concluding "in the matchless name of Jesus, the Humble servant of all"). And on April 20, 1983, the day *Marsh* was argued, Chaplain Halverson closed his prayer, "in the name of Jesus, Savior and Lord." *Id.*

It was against this historical backdrop that *Marsh* stressed that those who instituted legislative prayer "did not consider opening prayers as proselytizing activity or as symbolically placing the government's official seal of approval on one religious view." *Marsh*, 463 U.S. at 792 (citation and quotation marks omitted). Accordingly, the Court was concerned only with whether "the prayer *opportunity* has been *exploited* to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95 (emphases added).

Consequently, contrary to the decision below, a prayer does not necessarily proselytize or "aggressively advocate" a particular faith merely by

making a few distinctly Christian references. As the Eleventh Circuit noted in *Pelphrey*, "[t]he *Marsh* Court considered several factors to determine whether the legislative prayers had been exploited to advance one faith. The Court weighed the chaplain's religious affiliation, his tenure, and the overall nature of his prayers." *Pelphrey*, 547 F.3d at 1271 (citing *Marsh*, 463 U.S. at 792-95) "The 'nonsectarian' nature of the chaplain's prayers was one factor in this fact-intensive analysis; it did not form the basis for a bright-line rule." *Id.*

In other words, sifting out proselytization merely by reference to whether a prayer can be identified with a particular religious viewpoint casts too broad a net. As the Tenth Circuit observed in reviewing city council prayers, "*all* prayers 'advance' a particular faith or belief in one way or another." *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 n.10 (10th Cir. 1998) (emphasis added). "Thus, the kind of legislative prayer that will run afoul of the Constitution is one that *proselytizes* a particular religious tenet or belief, or that *aggressively* advocates a specific religious creed, or that derogates another religious faith or doctrine." *Id.* at 1234 (emphases added).

In this regard, requiring legislative leaders to police prayers for "sectarian" references offers no real guidance. While Judge Hamilton's preclusion of prayers bearing "Christ's name or title" had at least

some commonly understood meaning, his prohibition on prayers with "denominational appeal" was highly elusive. In denying the House Speaker's motion to alter or amend the judgment in *Hinrichs*, Judge Hamilton attempted further definition: "Prayers are sectarian in the Christian tradition when they proclaim or otherwise communicate the beliefs that Jesus of Nazareth was the Christ, the Messiah, the Son of God, or the Savior, or that he was resurrected, or that he will return on Judgment Day or is otherwise divine." *Hinrichs v. Bosma*, No. 1:05-cv-0813-DCH-TAB, 2005 WL 3544300, at *7 (S.D. Ind. Dec. 28, 2005) (Entry on Post-Judgment Motions). But this definition leaves courts to do exactly what *Marsh* said they should not: "parse the content of [] particular prayer[s]." *Marsh*, 463 U.S. at 795.

Furthermore, while Judge Hamilton thereby set forth the prohibitions against *Christian* prayers in relatively explicit terms, he did not explain in similar detail what an impermissible "sectarian" prayer of another, non-Christian faith might look like. Judge Hamilton said only that "[i]f those offering prayers in the Indiana House of Representatives choose to use the Arabic Allah, the Spanish Dios, the German Gott, the French Dieu, the Swedish Gud, the Greek Theos, the Hebrew Elohim, the Italian Dio, or any other language's terms in addressing the God who is the focus of the non-sectarian prayers contemplated in *Marsh v. Chambers*, the court sees little risk that the choice of

language would advance a particular religion or disparage others." *Hinrichs*, 2005 WL 3544300, at *7.

Unfortunately, this statement raises as many questions as it answers. What, indeed, does it mean to pray to "the God who is the focus of the non-sectarian prayers contemplated in *Marsh v. Chambers*"? Is there a safe harbor for legislative prayer that excludes Hindus who may wish to pray to Vishnu or Shiva? Is it really fair to preclude prayers to Jesus because they advance Christianity, but to permit prayers to Allah on the theory that they do *not* similarly advance Islam? These are just a few of the puzzles that arise when courts seek to preclude supposedly "sectarian" legislative prayers.

Not only Judge Hamilton in *Hinrichs*, but also, tentatively, the Seventh Circuit in that same case, the Fourth Circuit in *Joyner*, and, in practice, the Second Circuit here, all have concluded that they *must* determine whether particular legislative prayers are sectarian or nonsectarian under *Marsh*, as modified (in their view) by *Allegheny*. The Eleventh Circuit in contrast, has understandably struggled with the idea of defining "sectarian" prayers, stating, "We would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions[.]" *Pelphrey*, 547 F. 3d at 1272. Ultimately, said the court, "[w]hether invocations of 'Lord of Lords' or 'the God of Abraham,

Isaac, and Mohammed' are 'sectarian' is best left to theologians, not courts of law." *Id.* at 1267.

Plainly, these distinguished federal judges—not to mention the judges whose varying approaches are illustrated in the appendix to this brief—fundamentally disagree with one another, and the emerging mix of precedents bearing on legislative prayer is creating divergent circuit precedents. The Court should grant the Town of Greece's Petition in order to prevent yet another sector of Establishment Clause doctrine from sliding into irretrievable chaos.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDIX: LEGISLATIVE PRAYER LAWSUITS SINCE 2004	
Citation	**Disposition**
Wynne v. Town of Great Falls, 376 F.3d 292 (4th Cir. 2004)	Town council prayer practice struck down based on *Marsh* footnote 14 and *Allegheny*
Dobrich v. Walls, 380 F. Supp. 2d 366 (D. Del. 2005)	School board prayer practice upheld based on *Marsh* historical analysis
Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276 (4th Cir. 2005)	County board of supervisors prayer practice upheld based on *Marsh* footnote 14 and *Allegheny* because prayers were nonsectarian
Hinrichs v. Bosma, 400 F. Supp. 2d 1103 (S.D. Ind. 2005), *vacated on standing grounds*, 506 F.3d 584 (7th cir. 2007)	Challenge to Indiana House of Representatives prayer practice; district court enjoined based on *Marsh* footnote 14 and *Allegheny*; Seventh Circuit ultimately vacated for lack of standing

Citation	Disposition
Doe v. Tangipahoa Parish Sch. Bd., 473 F.3d 188 (5th Cir. 2006), *vacated on standing grounds*, 494 F.3d 494 (5th Cir. 2007) (en banc)	2-1 vote against school board prayer practice based on three different rationales (including two different readings of *Marsh*); vacated for lack of standing by *en banc* Fifth Circuit
Turner v. City Council of City of Fredericksburg, 534 F.3d 352 (4th Cir. 2008)	Upheld city council prayer policy that required prayers to be "nondenominational" because "the Establishment Clause does not absolutely dictate the form of legislative prayer."
Pelphrey v. Cobb County, 547 F.3d 1263 (11th Cir. 2008)	Upheld county commission prayer practice based on *Marsh* historical analysis

Citation	Disposition
Doe v. Tangipahoa Parish, 631 F. Supp. 2d 823 (E.D. La. 2009)	New school board prayer policy upheld based on *Marsh* historical analysis; new policy asked prayer-givers to strive for an ecumenical prayer but did-not require school board pre-screening of prayers
Doe v. Indian River School Dist., 653 F.3d 256 (3d Cir. 2011)	School board prayer struck down under *Lemon* as species of school prayer
Joyner v. Forsyth County, 653 F.3d 341 (4th Cir. 2011)	County board of commissioners prayer practice struck down under *Marsh* footnote 14 and *Allegheny*
Rubin v. City of Lancaster, 802 F. Supp. 2d 1107 (C.D. Cal. 2011)	City council prayer practice upheld based on *Marsh* historical analysis; appeal pending
Atheists of Florida, Inc. v. City of Lakeland, 838 F. Supp. 2d 1293 (M.D. Fla. 2012)	City commission prayer practice upheld based on *Marsh* historical analysis; appeal pending

Citation	Disposition
Galloway v. Town of Greece, 681 F.3d 20 (2d Cir. 2012)	Town board prayer practice struck down based on *Marsh* footnote 14 and *Allegheny*
Mullins v. Sussex County, 861 F. Supp. 2d 411 (D. Del. 2012)	County council president enjoined from reciting the Lord's Prayer before opening of meetings based on *Marsh* footnote 14 and *Allegheny*
Doe v. Pittsylvania County, 842 F. Supp. 2d 906 (W.D. Va. 2012)	County board's prayer practice unconstitutional based on *Marsh* footnote 14 and *Allegheny*
Jones v. Hamilton County, --- F. Supp. 2d ---, 2012 WL 3763963 (E.D. Tenn. Aug. 29, 2012)	Prayer upheld at preliminary injunction stage on theory that *Marsh* historical analysis permits sectarian references; appeal pending

Citation	Disposition
Doe v. Franklin County, No. 4:12-cv-918 (E.D. Mo. filed May 18, 2012)	County commission prayer practice challenged; commission ceased practice after lawsuit was filed and plaintiff dismissed the challenge

AMICUS CURIAE BRIEF

No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

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INTEREST OF *AMICI CURIAE*[1]

Since its creation, the United States House of Representatives has begun its daily sessions with prayer. Both chambers of the First Congress passed resolutions to hire a salaried chaplain, whose foremost duty is to open each session with a formal invocation seeking the blessing of God on the people's elected Representatives as those leaders discharge their official duties.

Amici curiae are 49 Members of Congress in the United States House of Representatives, and are individually named in the appendix to this brief. These elected Representatives regard legislative prayer as important for policymaking bodies, both to solemnize official occasions and to seek God's blessing, wisdom, and guidance in making consequential decisions. Each Member also represents municipalities, school districts, and counties—not unlike Petitioner Town of Greece—and part of a sovereign State, each of which is governed by a body that practices legislative prayer at the outset of its meetings and sessions.

These legislative prayer practices are imperiled by the Second Circuit's decision, which is just the latest and most deeply-flawed decision in a growing line of recent legislative prayer cases. These Members and

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[1] Kenneth A. Klukowski authored this brief for *amici curiae*. No counsel for any party authored this brief in whole or part, and no one apart from *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and received at least ten days' notice.

their constituents would benefit from this Court granting the petition to clarify what forms of legislative prayer are consistent with the Constitution.

INTRODUCTION

In this Court's sole examination of legislative prayer in *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court determined the constitutionality of legislative prayer as practiced in Nebraska and nationwide primarily by analyzing Congress' legislative prayer practice. The Court looked approvingly to legislative prayer dating to the Founding, in the Continental Congress, Constitutional Convention, and First Congress which drafted the Establishment Clause. While no written prayers from the First Congress survive, other contemporaneous public prayers suggest the sort of content found in early legislative prayers. Similar prayers are offered in Congress today. If the Second Circuit's rule were correct, then Congress would have been violating the Constitution for more than two centuries.

The Second Circuit crafted an unprecedented totality-of-the-circumstances approach, resulting from a multifactor analysis of prayer content and prayer-giver religious affiliation. Applying this test, the panel invalidated Petitioner Town of Greece's prayer practice, holding it was an endorsement of Christianity.

However, Congress' longstanding legislative prayer practice violates all three factors utilized by the Second Circuit. The overwhelming majority of congressional prayers—97%—are offered by Christians. The majority of these prayers include identifiably Christian content,

including references to Jesus, the Holy Spirit, salvation, and Bible verses, such that they would be deemed overwhelmingly sectarian and therefore unconstitutional. And almost all of these prayers from the 112th Congress—again 97%—use first-person plural pronouns.

With its novel test, the Second Circuit deepened a three-way circuit split. The Fourth Circuit likewise does not permit frequent sectarian references in legislative prayer, but for very different reasons. Consequently, Congress' centuries-old practice would also be invalid under the Fourth Circuit's rule. However, Congress' prayers would easily survive under a very different reading of *Marsh* adopted by the Eleventh Circuit.

This Court should grant the petition for certiorari to clarify the proper standard for legislative prayer.

REASONS FOR GRANTING THE PETITION

I. THIS COURT DETERMINED THE CONSTITUTIONALITY OF LEGISLATIVE PRAYER IN *MARSH V. CHAMBERS* PRIMARILY BASED ON CONGRESS' LEGISLATIVE PRAYER PRACTICE DATING TO THE FOUNDING.

When examining the constitutionality of legislative prayer in a case involving the Nebraska legislature, the Court based its analysis primarily on Congress' legislative prayer practice. The Court began with the Continental Congress and Constitutional Convention. *See Marsh v. Chambers*, 463 U.S. 783, 787 (1983). Like his Senate counterpart, the House Chaplain is an

officer of the United States House of Representatives, established pursuant to authority granted by the Constitution. U.S. CONST. art. I, § 2, cl. 5. The Court in *Marsh* examined the history of the House and Senate creating their chaplaincies, and paying these clergy with salaries drawn from the Treasury. *See Marsh*, 463 U.S. at 788–89. The Court expressly noted that early discussions of having a Chaplain specifically contemplated a person who would offer prayers, *see id.* at 787 n.6, and prayers are the foremost feature of the Chaplain's public communication and literature. *See* U.S. HOUSE OF REPS., CHAPLAIN'S OFFICE BROCHURE, *available at* http://chaplain.house.gov/chaplaincy/chaplain_brochure.pdf.

Even when the Court considered the factual specifics of the case in *Marsh*, Congress' practice was the touchstone against which the Nebraska legislature's practice was evaluated. Nebraska's sixteen-year retention of Robert Palmer—a Presbyterian minister—as Chaplain was constitutional because Congress also had a long history of retaining chaplains of a single denomination. *Marsh*, 463 U.S. at 793–94. Nebraska paying Reverend Palmer a salary for his services was acceptable under the Establishment Clause because Congress—not to mention other legislative bodies—has a long history of paying its Chaplains a salary. *Id.* at 794; *see also id.* at 788 n.7 (quoting relevant text from 1 Stat. 71 (1789)). Nebraska's legislative "prayers in the Judeo-Christian tradition" did not offend the Establishment Clause, *id.* at 795, because of their "historical background," *id.* at 793.

Comparing any challenged legislative prayer practice to Congress' longstanding practice is thus central to a proper analysis of legislative prayer. The first prayer offered in the Continental Congress is showcased on the House Chaplain's website today. This prayer clearly violates the Establishment Clause under the Second Circuit's analysis, as Reverend Jacob Duché (1) presumed to pray for everyone present, (2) proclaimed that the God to whom he prayed reigns over every nation on earth, (3) declared that the leaders of America sought to be "dependent only on Thee," (4) asked this God to "direct the councils of this honorable assembly," (5) prayed that God would "crown them with everlasting glory in the world to come," and (6) closed by saying, "All this we ask in the name and through the merits of Jesus Christ, Thy Son and our Savior."[2]

Although no written records of legislative prayers offered in the First Congress survive, other public prayers and religious declarations from that period suggest the sort of content likely included in the legislative prayers of the Framing era. In 1798, President John Adams—who previously as Vice President presided over the Senate when the Establishment Clause was adopted—issued a proclamation asking that God, in "His infinite grace, through the Redeemer of the World, freely to remit all our offenses, and to incline us by His Holy Spirit to that sincere repentance and reformation which may

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[2] Rev. Jacob Duché, First Prayer of the Continental Congress (Sept. 7, 1774), *available at* http://chaplain.house.gov/archive/continental.html.

afford us reason to hope for his inestimable favor." H.R. MISC. DOC. NO. 210, 269 (1896). The following year, upon the death of George Washington, a prayer before Congress included beseeching God that they all "may obtain unto the resurrection of life, through Jesus Christ our Lord; at whose second coming in glorious majesty to judge the world . . . those who sleep in him shall be . . . made like unto his glorious body." Henry Lee III, *in* AN AMERICAN PRAYER BOOK 58–59 (Christopher L. Webber ed., 2008) (quoting *Philippians* 3:21).

Using Congress' modern legislative prayer practice as the baseline does not change the analysis. As shown below, in recent years the House Chaplain and guest chaplains have continued to offer prayers similar to those at the Founding, attended by all the factors the panel below identified as unacceptable under the Establishment Clause.[3] Unless Congress has been violating the Constitution since its ratification, the Second Circuit's test is error. In either event, this Court's review is warranted.

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[3] Petitioners also argue that prayers offered by private citizens may enjoy additional protection under public-forum doctrine. Pet. 23–25. While that argument would not apply to the prayers in Congress offered by an official Chaplain, it might apply to the many prayers offered by guest chaplains.

II. CONGRESS' LONGSTANDING LEGISLATIVE PRAYER PRACTICE WOULD BE UNCONSTITUTIONAL UNDER THE SECOND CIRCUIT'S MULTIFACTOR TEST.

Congress' legislative prayer practice examined approvingly in *Marsh* would be held unconstitutional under the Second Circuit's analysis.[4]

The Office of the Chaplain section of the official website of the U.S. House of Representatives includes a Prayer Archive, consisting of every prayer offered in the House since Mar. 27, 2000.[5] Examining the prayers of the recently-concluded 112th Congress provides a large sample of modern legislative prayers. There were 304 prayers offered in the House of Representatives during the 112th Congress, 179 (59%) from the House Chaplain, and 125 (41%) from guest chaplains.[6] Significant observations can be drawn from an analysis of these prayers to conclude that the Second Circuit's multifactor test for evaluating legislative prayers cannot be the test the Constitution requires.

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[4] As *amici curiae* are Members of the House of Representatives, this brief focuses on legislative prayer in the House. *Amici* are aware of no material distinction between prayers in the House versus prayers in the Senate, and both Senate Chaplain Barry Black and his Chief of Staff Alan Keiran frequently offer prayers in the House.

[5] Office of the Chaplain, U.S. House of Reps., Prayer Archive, http://chaplain.house.gov/archive/index.html.

[6] All citations to the House Chaplain's website should be regarded as last visited Dec. 13, 2012, when the most recently recorded prayer was offered Dec. 7, 2012.

The district court below was correct in finding that "legislative prayer in Congress . . . is often overtly sectarian." Pet. App. 127a. Indeed, this Court has found the same. *Marsh*, 463 U.S. at 793 & n.14; *Van Orden v. Perry*, 545 U.S. 677, 688 n.8 (2005) (plurality opinion of Rehnquist, C.J.). Notably, the dissenters in *Marsh* likewise found Congress' prayers unconstitutional in part because Congress' prayers are sectarian. *See Marsh*, 463 U.S. at 800 (Brennan, J., dissenting); *id.* at 823 & n.2 (Stevens, J., dissenting). Legislative prayers in Congress are overwhelmingly Christian, either in the self-professed religious identity of the prayer-giver, or in the content of the prayers, or both. Such prayers are "deeply embedded in the history and tradition of this Country." *Id.* at 786 (majority opinion).

The Second Circuit articulated three factors for finding legislative prayers violate the Establishment Clause. Pet. App. 17a–20a. Congress' longstanding practice would not survive under any of these three factors. This Court should grant certiorari to review this multifactor analysis.

A. With only rare exceptions, legislative prayers in Congress are offered by self-identified Christians.

As one factor, the court of appeals below held that an unacceptable proportion of the prayers offered in the Town of Greece were offered by self-identified Christians. Pet. App. 17a. Yet the proportion of Congress' prayers offered by self-identified Christians is even greater.

The House has had sixty Chaplains since the First Congress assembled in 1789. Of those, there have been seventeen Presbyterians, twenty-one Methodists, two Unitarians, one Universalist, four Episcopalians, two Congregationalists, one from the Disciples of Christ, one Lutheran, two Roman Catholics, eight Baptists, and one nondenominational Christian.[7] The current Chaplain is Reverend Patrick J. Conroy, a Roman Catholic priest who has served since May 25, 2011,[8] during the 112th Congress.[9] Thus, depending on how one defines the term "Christian," at least 57 of 60 House Chaplains—95%—are identifiably Christian.[10]

The guest chaplains that frequently offer prayers—41% in the 112th Congress—are likewise overwhelmingly Christian. Of the 304 prayers in the 112th Congress, only eight were offered by non-Christians: seven Jewish rabbis, and one Muslim imam. Therefore 296 prayers—97%—were offered by Christians.

This Court should grant certiorari to reaffirm both that Congress is free to appoint a Chaplain of its choice

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[7] Office of the Chaplain, U.S. House of Reps., History of the Chaplaincy, http://chaplain.house.gov/chaplaincy/history.html.

[8] Office of the Chaplain, U.S. House of Reps., The Chaplain of the House, http://chaplain.house.gov/chaplaincy/index.html.

[9] The House Chaplain during the first five months of the 112th Congress was Reverend Daniel P. Coughlin, also a Roman Catholic priest. *See* History of the Chaplaincy, *supra* note 7.

[10] *See* FRANK S. MEAD & SAMUEL S. HILL, HANDBOOK OF DENOMINATIONS 231–36 (9th ed., Abingdon Press 1990).

regardless of the clergyman's religion, and also that Congress' practice whereby most prayers are offered by Christians does not offend the Establishment Clause.

B. The majority of legislative prayers in Congress include explicit Christian content.

Another factor the Second Circuit held indicated an Establishment Clause violation is prayer content that is identifiably Christian, if multiple prayers over time gives the "impression [of a] steady drumbeat of often specifically sectarian Christian prayers," Pet. App. 19a, rather than isolated sectarian prayers. Looking at the prayer content the court of appeals enumerated as problematic, the list includes: (1) Jesus Christ, (2) the Holy Spirit, (3) the Trinity, (4) salvation, and (5) Christian holidays. *See id.* at 6a, 18a. The Second Circuit held that such language, taken under "the totality of the circumstances . . . identifie[s] the [government] with Christianity in violation of the Establishment Clause." *Id.* at 19a. Otherwise stated, the test is "whether what [the government] does, in context, reasonably can be seen as endorsing a particular faith or creed over others," or similarly "affiliating" the government with Christianity. *Id.* at 22a.[11]

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[11] This endorsement test, which was narrowly adopted in *County of Allegheny v. ACLU, Greater Pittsburgh Ch.*, 492 U.S. 573, 592 (1989), is one variation of the second prong of the test from *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). This Court in *Marsh* declined to apply the *Lemon* test to legislative prayers, as petitioner's counsel ably explains. Pet. 11–12, 13, 18.

1. It is common for prayers in the House to mention Jesus Christ. Combining the references to "Jesus," "Christ," "Your Son," and similar references, 40 of the 304 House prayers invoke the name of Jesus.

Some prayers are unadorned invocations, such as, "In Jesus Christ's name, we pray. Amen."[12] Others include statements of Christian beliefs regarding Jesus, such as, "Restore our Nation's historic faith that we might pray 'God bless America' with integrity. We ask these things in the name of our Lord and Savior, Jesus Christ."[13] Still others might combine it with biblical references or historical content, such as this reference to the Framers:

> Lord, we ask You to protect our Nation and help us to remember, "With God, all things are possible." Help us to be one Nation under God. Forgive us of our sins and for the times we have not trusted in You. As George Washington closed his prayer in April of 1789, "Grant our

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[12] Rev. Wallace Shepherd, House Prayer, 112th Cong. (May 11, 2011), *available at* http://chaplain.house.gov/archive/index.html?id=1565. Variations in spelling and capitalization in prayer quotations are to be attributed to the varying authorship of the prayers, as all the quotations herein are precisely as recorded in the Prayer Archive, unless noted otherwise. All documentation pertaining to the analysis that follows in this brief and substantiating the statistics included herein are on file with the author of the brief, and counsel for *amici* will furnish this documentation to the Court upon request.

[13] Rev. Dr. David Anderson, House Prayer, 112th Cong. (Feb. 8, 2012), *available at* http://chaplain.house.gov/archive/index.html?id=1747.

supplication, we beseech thee, through Jesus Christ, our Lord, Amen."[14]

2. Even more common are references to the Holy Spirit. The record shows 62 prayers during the 112th Congress referenced the Holy Spirit.

These can be third-person, such as, "Gracious and loving Father, we . . . ask You to send the Holy Spirit of good counsel and fortitude to all who make the law . . . ."[15] Others address the Holy Spirit as God, such as, "Come Holy Spirit, fill the hearts of Your faithful believers . . that they may be truly open to respond to Your Word . . . . ."[16]

3. Many prayers also invoke the Trinity, with 16 prayers during the past Congress including references to the Trinity.

These can be simple invocations, such as, "In the name of the Father, the Son, and the Holy Spirit, Amen."[17] Others use language from well-known

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[14] Rev. Kenneth Johnson, House Prayer, 112th Cong. (Nov. 28, 2012), *available at* http://chaplain.house.gov/archive/index.html?id=1862.

[15] Rev. Jesse Reyes, House Prayer, 112th Cong. (Oct. 13, 2011), *available at* http://chaplain.house.gov/archive/index.html?id=1688.

[16] Rev. Daniel P. Coughlin, House Prayer, 112th Cong. (Jan. 5, 2011), *available at* http://chaplain.house.gov/archive/index.html?id=1510.

[17] Rev. Aaron Damiani, House Prayer, 112th Cong. (June 25, 2012), *available at* http://chaplain.house.gov/archive/index.html?id=1811.

Christian creeds, such as, "Lord, keep this Nation under Your care and guide us . . . through Jesus Christ our Lord, who lives and reigns with You and the Holy Spirit, one God, world without end. Amen."[18] Still others expound upon each person in the Trinity, such as, "May every family member represented know the love of the Father, the presence of His Son, and the guidance of the Holy Spirit."[19]

4. Still other prayers reference Christian beliefs regarding salvation. Combining references to Jesus Christ as savior with references to being saved from sin, 17 prayers in the last Congress included such language.

Some prayers combine this language with biblical verses. For example: "Heavenly Father, We come to you in Jesus[']] name on behalf of this great nation. . . Keep us mindful of your word, 'Righteousness exalts a nation[,] but sin is a reproach to any people.' . . . All this we ask in the name of Jesus Christ, your Son, and our Savior."[20]

Others reference Jesus in a more exclusive fashion regarding salvation. One prayer begins, "Father, we

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[18] Rev. Blake Johnson, House Prayer, 112th Cong. (Mar. 16, 2012), *available at* http://chaplain.house.gov/archive/index.html?id=1765.

[19] Rev. Gene Mills, House Prayer, 112th Cong. (May 25, 2011), *available at* http://chaplain.house.gov/archive/index.html?id=1570.

[20] Rev. Rick Postell, House Prayer, 112th Cong. (July 27, 2011), *available at* http://chaplain.house.gov/archive/index.html?id=1605 (quoting *Proverbs* 14:34).

thank You for this Nation, and, most of all, Your forgiveness of sins," then quotes three Bible verses, and concludes, "In the only name through whom man can be saved, Jesus Christ. Amen."[21]

Still others quote biblical verses on salvation, but those verses do not on their face speak of Jesus saving people from their sins. For example, the Senate Chaplain, offering a prayer as a guest of his House counterpart, invoked biblical language of salvation through faith in Jesus Christ when he prayed:

> Challenge us, O God, when, with the abundance of the things we possess, we lose our thirst for the waters of life. Challenge us when we forget that righteousness exalts a nation, but that sin is an equal opportunity destroyer. Challenge us when we fail to join You in Your quest to bring deliverance to captives, the recovery of sight to the blind, and to set at liberty those who are bruised.[22]

This last variation should be noted because courts would have to consider context and the theological significance of verses in order to apply this aspect of the Second Circuit's test in determining whether such

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[21] Rev. Bryan Thiessen, House Prayer, 112th Cong. (Dec. 6, 2011), *available at* http://chaplain.house.gov/archive/index.html?id=1714 (quoting *James* 1:5, *Romans* 13:1, *Matthew* 5:44).

[22] Rev. Dr. Barry Black, House Prayer, 112th Cong. (Mar. 30, 2012), *available at* http://chaplain.house.gov/archive/index.html?id=1777 (referencing *Revelation* 7:17, *Proverbs* 14:34, and *Luke* 4:14-21, respectively).

prayer language should be tallied under the heading of "sectarian Christian," illustrating yet another flaw in the reasoning of the court below.

5. Some prayers also reference Christian holidays. These prayers are less frequent over a period of time because they are commonly made shortly before the referenced holiday, but are not uncommon during those parts of the year.[23]

Such prayers might be plain references, such as, "Fill . . . us with Your peace and joy this Christmas season."[24] Others use more oblique language, as when House Chaplain Patrick Conroy referred to Christmas in one prayer as "this Holy Season of Hope."[25]

Still others expound the meaning of the holiday by referencing its scriptural or historical origin, such as a prayer that begins, "Dear Heavenly Father, as we approach the remembrance of Pentecost when the Holy

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[23] Notably, Members of Congress occasionally invoke Christian holidays connected with prayer. *See, e.g.*, 158 CONG. REC. H1796 (daily ed. Mar. 29, 2012) (statement of Rep. Gohmert) (reciting an Easter prayer with Christian language including, "O Christ . . . Help us to remember that we are praying to the Conqueror of Death," and closing the floor statement with, "It is a good prayer, Mr. Speaker, to pray as we head for the Easter recess.").

[24] Rev. Roger Schoolcraft, House Prayer, 112th Cong. (Dec. 7, 2011), *available at* http://chaplain.house.gov/archive/index.html?id=1715.

[25] Rev. Patrick J. Conroy, House Prayer, 112th Cong. (Dec. 20, 2011), *available at* http://chaplain.house.gov/archive/index.html?id=1724.

Spirit descended upon the apostles gathered in prayer, we pray for a new outpouring of Your Spirit upon us today. ."[26]

The Second Circuit's muddled test is unclear as to what constitutes indicia of an Establishment Clause violation under this heading. Do even vague allusions suffice? Or does the naming of the holiday go on a list of "dirty words" where the Establishment Clause is concerned? Or is the Constitution only violated when the holiday is explained?

Two additional types of content frequently found in Congress' prayers are of a piece with the five enumerated topics, but were not discussed by the Second Circuit. They nonetheless fit the Second Circuit's test under a totality of the circumstances, as they "reasonably can be seen as endorsing a particular faith or creed over others" or otherwise "affiliating" the government with Christianity. Pet. App. 22a. They are (6) Christian religious devotion and Christian doctrines aside from salvation,[27] and (7) New Testament Bible references.

6. Many prayers expressly invoke other Christian doctrines or expressions of religious devotion. The

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[26] Rev. Carter Griffin, House Prayer, 112th Cong. (June 7, 2011), *available at* http://chaplain.house.gov/archive/index.html?id=1576.

[27] The Fourth Circuit recently held that "invok[ing] specific tenets and articles of faith of Christianity" can render legislative prayers unconstitutional. *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 350 (4th Cir. 2011).

House Prayer Archive includes 50 such prayers that were offered in the House over the past two years.

Some include a pledge to carry out God's will. For example: "Lord, our God and Savior . . . . may we respond to Your commands and holy inspirations to build Your kingdom of peace and justice."[28]

Others assert certain beliefs regarding the power, purpose, or character of God. One such prayer said:

> To the One who governs seas and quells the storms, we thank You for authoring each life . . . We come to you on the eve of this election, seeking wisdom from Isaiah 1 . . . . Teach us to fear You and keep Your commandments. . . . Let the wretched, poor, pitiful, naked and blind experience the transformation of Your grace so that Your name, O Lord, might be exalted among the nations."[29]

Others include declarations of religious devotion. These may be simple, such as, "Dear Holy and Righteous Father . . . we come first to humbly submit ourselves before You, acknowledging You as Lord and

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[28] Rev. Daniel P. Coughlin, House Prayer, 112th Cong. (Mar. 8, 2011), *available at* http://chaplain.house.gov/archive/index.html?id=1536.

[29] Rev. Stephen Willis, House Prayer, 112th Cong. (Nov. 2, 2012), *available at* http://chaplain.house.gov/archive/index.html?id=1854.

Creator."[30] Or they may be elaborate expressions of adoration, such as:

> Father God, as the Psalmist says, "I will extol the Lord at all times; His praise will always be on my lips. My soul will boast in the Lord; let the afflicted hear and rejoice. Glorify the Lord with me; let us exalt His name together." (Psalm 34:1–3). We depend on You, King of Heaven's armies, to reveal to our Nation's leaders Your plans . . . Inspire every public servant to seek Your wisdom and pray for Your daily favor . . . . This I ask in the Name above every name."[31]

There are no judicially-manageable standards for drawing lines in such a sensitive area as prayer by which a court can sort these doctrinal or devotional statements, permitting some as benign or inclusive, while barring others as too closely tied to adherents of a single faith. Such an attempt would instead be precisely the sort of "pars[ing] the content" of a prayer that the Constitution forbids. *Marsh*, 463 U.S. at 795.

7. In addition, many prayers reference the Bible for content aside from the subjects already discussed. The Bible was referenced in 46 prayers during the 112th Congress. Some prayers exclusively used verses from the New Testament, arguably associating the prayer with Christianity.

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[30] Rev. Donna Kafer, House Prayer, 112th Cong. (Nov. 14, 2012), *available at* http://chaplain.house.gov/archive/index.html?id=1859.

[31] Rev. Dr. Alan Keiran, House Prayer, 112th Cong. (Aug. 7, 2012), *available at* http://chaplain.house.gov/ archive/index.html?id=1860.

Some of these verses are directly relevant to formulating public policy. For example: "You say, O God, that from those to whom You have given much, much is expected."[32]

But some involve distinctly Christian religious sentiments, directed toward spiritual or eternal matters rather than public policy. One prayer-giver quotes Jesus, and refers to him as "Master," saying, "when the day is done may each [Member of Congress] hear the Master say, '[W]ell done, good and faithful servant[.]' Now, Father, with deep respect for the faith traditions of all Members, I offer this prayer in the name of my Lord and Savior, Jesus Christ."[33]

Others string multiple New Testament verses together, such as:

> Lord, your word declares "if any man lack wisdom let him ask God that giveth to all men liberally and upbraideth not; and it shall be given him." We ask for your unmerited favor upon the lives of every elected member . . . . In the name of Him who is able to keep us from

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[32] Rev. Dr. Alan Kieran, House Prayer, 112th Cong. (May 3, 2011), *available at* http://chaplain.house.gov/archive/index.html?id=1560 (quoting *Luke* 12:48).

[33] Rev. Dr. John Sloop, House Prayer, 112th Cong. (June 2, 2011), *available at* http://chaplain.house.gov/archive/index.html?id=1574 (quoting *Matthew* 25:21).

> falling and present us faultless before the presence of His glory with exceeding joy. Amen.[34]

Yet again, in order to determine whether each citation is a "sectarian Christian" reference, versus a generalized or even patriotic or statesmanlike inspirational reference, would require a federal court to consider various theological questions. Far from being required by the Establishment Clause, such an analysis would be a step toward precisely the sort of establishment of religion the Clause forbids.

* * *

Many prayers include more than one of these features. But even when all such multiple-reference prayers are accounted for, 154 prayers in the House during the 112th Congress were identifiably Christian in their content. Therefore a majority of the prayers offered in Congress are explicitly Christian, just as in the Town of Greece, Pet. App. 7a.

Adherents of other religions likewise frequently use faith-specific references. For example, a Muslim imam included in his prayer: "The Final Prophet of God, Muhammad (peace be upon him), stated: 'The leaders of a people are a representation of their deeds.'"[35] Similar to the Christian prayers examined here, the

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[34] Rev. Dr. Kathy Jones, House Prayer, 112th Cong. (Dec. 1, 2011), *available at* http://chaplain.house.gov/archive/index.html?id=1711 (quoting *James* 1:5, *Jude* 1:24).

[35] Imam Nayyar Imam, House Prayer, 112th Cong. (Aug. 2, 2012), *available at* http://chaplain.house.gov/archive/index.html?id=1831.

clergyman invoked the distinctly Islamic belief that Muhammad was a prophet sent by God, used distinctly Islamic phraseology ("peace be upon him" when mentioning Muhammad's name), and then quoted Islamic scripture.

The Second Circuit's multifactor test is completely unworkable, transforming federal courts into the role of "ecclesiastical arbiter." *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1274 (11th Cir. 2008) (citation omitted). This intensive and wide-ranging examination of prayer content is incompatible with *Marsh*. This Court's review is warranted.

C. Almost all legislative prayers in Congress use the first-person plural pronoun.

Congressional legislative prayers would also be particularly suspect under the Second Circuit designating as a factor weighing against constitutionality the practice of beginning a prayer with any version of, "Let us pray," or using the term "We" to speak for others. Pet. App. 23a. Language such as "Let us pray" is often found in prayers offered in the House.[36] And although this brief focuses on legislative prayer as practiced by the House, the Court should note that the *Congressional Record* reveals that no fewer than 235 prayers in the Senate during the two

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[36] *E.g.*, Jones Prayer, *supra* note 34.

years of the 112th Congress began which the invitation, "Let us pray."[37]

Moreover, the frequency of these objectionable prayers in the House greatly increases when a court considers the use of first-person plural pronouns, such as "We ask these things through Christ our Lord," since it necessarily carries the connotation that the prayer-giver is speaking for others as well, whether they be Members present in the room, the entire House, all within the sound of the prayer-giver's voice, or even the Nation as a whole. The vast majority of prayers include such language.[38] Only rarely does a person offering a public prayer use only the first-person singular in front of an audience, especially professional clergy who are accustomed to praying on behalf of a congregation from a speaking dais.

In fact, during the two years of the 112th Congress, only ten prayers did *not* use such plural language. Otherwise stated—*97% of prayers in the House* violated this factor designated as indicative of unconstitutionality by the Second Circuit. Given the ubiquity of such language, finding fault with it is nothing short of astonishing; it could be a matter of

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[37] *See* The Library of Congress, Thomas, Search the Congressional Record, 112th Congress, http://thomas.loc.gov/home/LegislativeData.php?&n=Record, then type "let us pray" in "Enter Search" window.

[38] *E.g.*, Rev. Patrick J. Conroy, House Prayer, 112th Cong. (Nov. 18, 2011), *available at* http://chaplain.house.gov/archive/index.html?id=1706 ("Eternal God, we give you thanks for giving us another day.").

judicial notice that most prayers include first-person plural language. The Second Circuit's designation was error.

If anything, nominative-case plural pronouns would be even more noxious to the Constitution than, "Let us pray." While the latter is merely an invitation which the hearer may reject, utilizing the former necessarily carries the presumption and implication that the prayer-giver does in fact speak for others. Still more, some prayer-givers use such presumptive language in Congress when proclaiming religious devotion. For example: "May we possess Your talking points, Your heart, and Your mind in the matters of national importance. Finally, we pray, as we were instructed by Your word, for the peace of Jerusalem and throughout the Middle East. May Thy will be done today."[39]

The Second Circuit's opinion sweeps far too broadly, as with this last factor Judge Calabresi's reasoning proves too much. The vast majority of legislative prayers offered in Congress—and almost certainly throughout the Nation—presume to speak for persons in addition to the prayer-giver, either through inviting others to join the prayer, or by speaking with plural pronouns to include persons in addition to the prayer-giver. The Second Circuit's holding would thus invalidate Congress' longstanding practice. This Court should grant the petition to clarify that such typical language does not offend the Establishment Clause.

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[39] Mills Prayer, *supra* note 19.

III. THE THREE-WAY CIRCUIT SPLIT CREATED BY THE SECOND CIRCUIT'S DECISION CREATES UNCERTAINTY ABOUT THE CONSTITUTIONALITY OF CONGRESS' LONGSTANDING LEGISLATIVE PRAYER PRACTICE.

The court of appeals' decision also creates a three-way circuit split. Congress' legislative prayer practice would be constitutional under the test in one circuit, unconstitutional under the tests in two circuits—but for different reasons—and it is anyone's guess how Congress would fare in the remaining circuits, including the one with jurisdiction over Capitol Hill. This Court's review is therefore warranted.

It is clear from Parts I & II Congress' legislative prayers would violate the Constitution under Judge Calabresi's rule for the Second Circuit. Congress' longstanding practice would also violate the Establishment Clause in the Fourth Circuit, but under a rationale that is irreconcilable with the Second Circuit. Yet in the Eleventh Circuit Congress' practice would easily pass muster.

One aspect of the Second Circuit's opinion that is novel among the appellate courts is declaring a totality-of-the-circumstances test to determine whether legislative prayers are constitutional. *See* Pet. App. 17a.[40] This is further complicated by the fact that the

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[40] That the district court below held that a totality of the circumstances confirmed the Town of Greece did *not* violate the Establishment Clause, *see* Pet. App. 129a–130a, confirms the hopelessly unreliable nature of this novel text which is untethered from historical practices or judicially manageable standards.

Second Circuit adopts part of the Fourth Circuit's reasoning, saying, "We agree that 'courts should not be in the business of policing prayers for the occasional sectarian reference.'" Pet. App. 18a n.6 (quoting *Joyner*, 653 at 351). So rather than a practicable standard, the only guidance governmental units have is that isolated sectarian references are probably acceptable, though even that cannot be relied upon as dispositive since the court can look to other prayers offered over a period of time by other prayer-givers.

The resulting problem is further compounded by the reality that there are no objective legal criteria for differentiating sectarian statements from nonsectarian ones. *See Pelphrey*, 547 F.3d at 1267 ("Whether invocations of 'Lord of Lords' or 'God of Abraham, Isaac, and Mohammed' are 'sectarian' is best left to theologians, not courts of law."). While there are doctrinal criteria upon which religious professionals make these distinctions, there are no corresponding neutral principles of law that courts are competent to employ to make such theological judgments. Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J.L. & PUB. POL'Y 219, 252–54 (2008).

In the most recent appellate decision preceding the instant case, the Fourth Circuit likewise superimposed the endorsement test onto *Marsh*, as discussed by petitioner. *See Joyner*, 653 F.3d at 355 (declaring unconstitutional prayers that are "government advancement and effective *endorsement* of one faith") (emphasis added); Pet. 5, 7. In *Joyner*, a divided panel of the Fourth Circuit specifically forbade prayers with

"frequent" references to Jesus or specific theological assertions. *Id.* at 343, 349. Violations can even result from "a solitary reference to Jesus Christ." *Id.* at 349 (citation omitted).

Congress cannot adopt the Fourth Circuit's rule that government must "strive to be nondenominational . [to] send a signal of welcome" and be "proactive in discouraging sectarian prayer," *id.* at 349, 353, without violating this Court's command that government cannot in any way "assist in composing prayers," regardless of whether it is an attempt to achieve legislative prayers that "recognize the common aspects of religions and not the divisive ones." *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

But as counsel for petitioner explains, *see* Pet. 10–15, the Second Circuit only deepens a circuit split that is reducing legislative-prayer jurisprudence to incoherence. While prayers like those offered in the House are unacceptable in the Second or Fourth Circuits, those same prayers would be acceptable in the Eleventh Circuit, which allows sectarian prayer if the prayer opportunity has not been exploited to proselytize or similarly advance a faith, or disparage another faith. *Pelphrey*, 547 F.3d at 1271; *see also* Pet. 11.

The Second Circuit's decision exacerbates a situation whereby prayers that are easily acceptable under the Establishment Clause in one circuit would be unconstitutional in another. Thus for *amici*, prayers legal at local government events in one Member's congressional district are illegal in an identical town meeting in another district. Whatever the Constitution

allows by way of legislative prayer, it should equally allow in all 435 House districts, and well as on Capitol Hill.

This Court should grant review and safeguard congressional prayers by resolving this circuit split.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 7, 2013

APPENDIX

APPENDIX

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Appendix A: List of Members of the House of Representatives joining in the *amici curiae* brief 1a

APPENDIX A

Forty-nine (49) Members of the House of Representatives in the Congress of the United States have joined this brief as *amici curiae*. This group includes three Members of the 112th Congress who vacated their House seats on Jan. 3, 2013, and four new Congressmen who joined the House on that day. All other *amici* served in the House in both the 112th Congress and the 113th Congress.

These Members of Congress are the Honorable:

Rep. Sandy Adams

Rep. Robert Aderholt

Rep. Michele Bachmann

Rep. Dan Benishek

Rep. Diane Black

Rep. Marsha Blackburn

Rep. Paul Broun

Rep. Kevin Cramer

Rep. Jeff Duncan

Rep. Randy Forbes

Rep. Virginia Foxx

Rep. Trent Franks

Rep. Scott Garrett

Rep. Phil Gingrey

Rep. Louie Gohmert

Rep. Bob Goodlatte

Rep. Morgan Griffith

Rep. Andy Harris

Rep. Vicky Hartzler

Rep. Tim Huelskamp

Rep. Jim Jordan

Rep. Mike Kelly

Rep. Steve King

Rep. Jeff Landry

Rep. James Lankford

Rep. Cynthia Lummis

Rep. Mike McIntyre

Rep. David McKinley

Rep. Mark Meadows

Rep. Luke Messer

Rep. Randy Neugebauer

Rep. Kristi Noem

Rep. Steven Palazzo

Rep. Steve Pearce

Rep. Robert Pittenger

Rep. Mike Pompeo

Rep. Tom Price

Rep. Reid Ribble

Rep. Todd Rokita

Rep. Steve Scalise

Rep. Lamar Smith

Rep. Steve Southerland

Rep. Scott Tipton

Rep. Mike Turner

Rep. Tim Walberg

Rep. Daniel Webster

Rep. Brad Wenstrup

Rep. Allen West

Rep. Lynn Westmoreland

AMICUS CURIAE BRIEF

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* REV. DR. ROBERT E. PALMER SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Rev. Dr. Robert E. Palmer, a Presbyterian minister, was the chaplain of the Nebraska Legislature whose prayers were the subject of this Court's decision in

[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and his counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioner and respondents were timely notified of *amicus*'s intent to file this brief. Petitioner's letter consenting to the filing of any *amicus* brief has been filed with the Clerk's office, and respondents' consent to the filing of this brief has been lodged with the Clerk's office.

Marsh v. *Chambers*, 463 U.S. 783 (1983). In *Marsh*, the Court held that the Establishment Clause did not prohibit either Rev. Palmer's compensated position as chaplain, his continued reappointment over sixteen years, or the content of the prayers he offered at the start of each legislative workday. *Marsh*, 463 U.S. at 792-795.

The opinion of the Court used the word "sectarian" only once—by quoting Rev. Palmer's own characterization of his prayer practice as "nonsectarian." *Marsh*, 463 U.S. at 793 n.14. That characterization was taken from his deposition, which—like the prayers themselves—is in the record of that case. See Record on Appeal & Cross-Appeal, *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (No. 82-234) (hereinafter "*Marsh* Record"). In his deposition, Rev. Palmer explained that his prayers were simultaneously "nonsectarian" *and* that many were identifiably Christian. He did not mean, and this Court plainly did not take him to mean, that any prayer is "sectarian" unless so drained of religious content as to be of no identifiable religious tradition.[2]

This case and the Court's treatment of it are accordingly of considerable interest to Rev. Palmer. As a defendant in *Marsh*, he is concerned about recent cases, like the Second Circuit's here, which retreat from *Marsh*'s holding. Rev. Palmer believes that legislative bodies which desire to exercise their First Amendment right of solemnly invoking divine guidance should not be impaired by court rulings that inject uncertainty and discourage assemblies from exercising that right. More directly, he believes that his own past practice lies within

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[2] As the Court noted, Rev. Palmer did omit using the name of Jesus Christ itself in 1980 in response to a Jewish legislator's request. *Marsh* v. *Chambers*, 463 U.S. 783, 793 n.14 (1983). But the record of prayers in *Marsh* closed in 1979; the pre-1980 prayers were those challenged and evaluated by this Court. See *infra* pp. 8-9.

the American constitutional tradition, and that it—and other practices like it today and in the future across the Nation—are worth this Court's continued vindication.

The judgment below casts doubt on whether *Marsh* was rightly decided and whether Rev. Palmer's service to the Nebraska Legislature was constitutional. That is because Rev. Palmer's prayer practice was in every way more identifiably Christian than the practice of the Town of Greece appears to be. For the benefit of all legislative assemblies, and of chaplains like Rev. Palmer, this Court should grant review, provide clarity, and affirm the legitimacy of legislative prayer.

SUMMARY OF ARGUMENT

1. When this Court decided *Marsh* v. *Chambers*, there was no doubt that the prayers being challenged were often "explicitly Christian." 463 U.S. at 793 n.14. The record before the Court was replete with Christian prayers, and dissenting justices regarded that as reason enough to strike down Nebraska's practice. But the Court refused. In full knowledge of his prayers' religious content, the Court credited Rev. Palmer's deposition statement that they were "nonsectarian"—a term understood in context to mean that the prayers did not advance a particular sect within the Judeo-Christian tradition (such as Rev. Palmer's own Presbyterianism). Consistent with Rev. Palmer's description, the Court held that his prayers posed no constitutional concerns, so long as "the prayer opportunity has [not] been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-795.

2. Some courts have departed from *Marsh*'s clear guidance because of a puzzling passage from a later case that had nothing to do with legislative prayer. In *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989), a brief dictum suggested that Rev.

Palmer's prayers were constitutional because, in 1980, he accommodated a Jewish legislator by omitting the name of Jesus Christ in prayers. That observation is contrary to the record of *Marsh* (which closed before 1980 and is full of identifiably Christian prayers) and to its holding (which put prayer content generally off-limits to judges).

Courts that dilute the *Marsh* holding with the *Allegheny* dictum have become active in patrolling prayer content—precisely what *Marsh* forbade.

3. This Court should grant review because this legal disarray chills the exercise of a constitutionally protected right—the right of legislative assemblies across the Nation to begin their sessions with invocations. *Marsh* provided broad scope for such prayers, subject to a narrow exception preventing truly extreme situations. The judgment below reverses that balance, turning ordinary practices into opportunities for full-scale litigation. Legislative prayer is no longer subject to clear legal rules but now depends upon the "legal judgment" of a federal judge. Pet. App. 18a. As the Second Circuit was plainly aware, many towns will simply give up in frustration when faced with so many obstacles. The court even hinted that prudent towns would abandon the plan to have legislative prayer. *Id.* at 27a. Such an assault on constitutional freedom is intolerable, and this Court should grant review to provide much-needed certainty.

ARGUMENT

This Court affirmed the constitutionality of legislative prayer in *Marsh* and expressly declined to scrutinize the content of such prayers. It did so with full knowledge of the highly religious content of Rev. Palmer's prayers, which were in the case's record. In recent years, however, some courts have revised this history. They have ascribed to Rev. Palmer's prayers an essentially non-religious character, and have interpreted *Marsh* as ap-

proving them because of their purported blandness. This double error has generated judicial interference in today's legislative-prayer practices, contrary to this Court's hands-off policy in *Marsh*. The solution is to grant review and reaffirm *Marsh*, which found the content of Rev. Palmer's prayers to be beyond judicial scrutiny despite their unmistakably religious nature, not because of their supposed nondescriptness.

I. This Court Upheld Rev. Palmer's Prayers With Full Knowledge Of Their Identifiably Christian Nature

A brief clarification of how *Marsh*'s record and holding interact will help explain, in Part II, how courts have misused that holding and record to undermine *Marsh*.

A. Rev. Palmer's prayers in the *Marsh* record were identifiably Christian

In *Marsh*, Nebraska Senator Ernest Chambers, a legislator and taxpayer, argued that Nebraska's legislative prayer practice was unconstitutional because the chaplain's daily "prayers are in the Judeo-Christian tradition." *Marsh*, 463 U.S. at 793. Senator Chambers's complaint in federal district court emphasized that Rev. Palmer's prayers "have frequent references to the Christian religion," and that Rev. Palmer made "[n]o effort" to drain those prayers of such content. J.A. 2, *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (No. 82-234) (Complaint ¶8).

Senator Chambers was correct—Rev. Palmer's prayers were routinely identifiably Christian. The record in *Marsh* contained annual "prayer books," compiling Rev. Palmer's prayers, ending in 1979. *See* 1979 Prayer Book, Exh. 3, *Marsh* Record.[3] The prayers actu-

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[3] Originally published in the Nebraska Legislative Journal, Rev. Palmer's prayers were periodically collected and republished as prayer books, which were later made exhibits in the *Marsh* record. *Marsh*, 463 U.S. at 785 n.1.

ally in the record—the ones that Senator Chambers presented to the federal courts for decision—were identifiably Christian. Accordingly, the Court could not have, and did not, put off for a future day the question of whether prayers that clearly come from a specific religious tradition are constitutional when part of a legislative-prayer practice.

One representative example is Rev. Palmer's prayer of April 12, 1977:

> Father in Heaven, we thank You this day for the gift of life. As spring returns to our countryside, we are reminded that the inevitable cycles of Nature are Your creation and no one is exempt. We thank you for the gift of Your Son, whose Resurrection we are celebrating, who is the reason for our hope and source of our joy. Help us now, rejuvenated by the recess, and inspired by Your Son's victory over death, to take up the business of the people and conduct it with justice, equality and love. Amen.

1977-78 Prayer Book at 6, Exh. 2, *Marsh* Record. Similar in make-up is his prayer of February 18, 1977:

> Our Father, as we pray for Your guidance and help, we know that You did not intend prayer to be a substitute for work. We know that we are expected to do our part for You have made us, not puppets, but persons with minds to think and wills to do. Make us willing to think, and think hard, clearly, and honestly, guided by Your voice within us, and in accordance with the light You have given us. May we never fail to do the very best we can. We pray in the knowledge that it all depends upon You. Help us then to work as if it all depended on us, that together we may do that which is pleasing in Your sight. For Jesus' sake. Amen.

Id. at 2. And his prayer of February 14, 1978, is also typical:

> O God, we consider our resources in money, men and land, yet forget the spiritual resources without which we dare not and cannot prosper. Forgive us for all our indifference to the means of grace thou hast appointed. Thy Word, the best seller of all books, remains among the great unread, the great unbelieved, the great ignored. Turn our thoughts again to that book which alone reveals what man is to believe concerning God and what duty God requires of man. Thus informed, thus directed, we shall understand the spiritual laws by which alone peace can be secured, learn what is the righteousness that alone exalteth a nation. For the sake of the world's peace and our own salvation, we pray in the name of Christ, thy revelation. Amen.

Id. at 18.

The predominantly Christian nature of Rev. Palmer's sixteen years of prayers did not go unnoticed by the Court. Indeed, Justice Stevens quoted one such prayer at length to show how identifiably Christian the prayers were. *Marsh*, 463 U.S. at 823-824 & n.2 (Stevens, J., dissenting) (quoting prayer of March 20, 1978).

B. Rev. Palmer's description of his prayers as "nonsectarian" has been taken out of context

The *Marsh* Court also adopted Rev. Palmer's description of his prayers as Christian yet non-sectarian. Rev. Palmer, a defendant in the suit brought by Senator Chambers, provided deposition testimony about the legislative-prayer practice that he administered as chaplain for sixteen years. This Court quoted Rev. Palmer's deposition in a two-sentence footnote:

> Palmer characterizes his prayers as 'nonsectarian,' 'Judeo Christian,' and with 'elements of the Ameri-

> can civil religion.' Although some of his earlier prayers were often explicitly Christian, Palmer removed all references to Christ after a 1980 complaint from a Jewish legislator.

Marsh, 463 U.S. at 793 n.14 (citations omitted).

It is not self-evident at first glance what this description really means. As the record reveals, see *supra* Part I.A, the Court was quite correct to observe that Rev. Palmer's "prayers were often explicitly Christian." *Marsh*, 463 U.S. at 793 n.14. But Rev. Palmer's description of *those very prayers* as "nonsectarian" may seem at odds with their "explicitly Christian" content.

One mistaken resolution of the seeming puzzle is to assume that the Court's reference to Rev. Palmer's 1980 accommodation of a Jewish legislator made the prayers "nonsectarian." But that is wrong. After all, the record ended with the 1979 prayers (and Senator Chambers's complaint was filed on December 12, 1979). Nor is there any indication that Rev. Palmer's accommodation either was a matter of binding policy or that omitting Christ's name would on its own be sufficient to render an otherwise "sectarian" Christian prayer automatically "nonsectarian." Nothing in the Court's opinion, or in any dissenting opinion, suggests that the absolute key to the decision was buried in the footnote and took the form of a bare mention of Rev. Palmer's 1980 practice—much less that the Court would rule on that post-litigation modification rather than the *sixteen years* of Rev. Palmer's prayers that were actually challenged.[4]

The objectively correct resolution is, instead, drawn from Rev. Palmer's deposition, which was the source for footnote 14. The deposition makes crystal clear that the

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[4] See also *infra* Part II.A, addressing this inference in *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989).

word "nonsectarian" is not a synonym for "devoid of identifiably Christian theology." Instead, Rev. Palmer called his prayers "non-sectarian" because they did not reflect the beliefs of one Christian "sect" or denomination over another—for instance, his own Presbyterianism. When pressed in his deposition to define a distinctly Christian prayer as "sectarian," he declined:

> I wouldn't say sectarian, but I'd say Christian. * * * [A] sect is not a religion. To me it would be a gross injustice to millions of people around the world were I to say that Islam is a sect or the Jewish faith is a sect or the Christian faith is a sect. In no way is that a sect by any stretch of my imagination or by any jumble of semantics I can imagine. * * * *Non-sectarian is one that does not promote the furtherance of any specific group, cult or division of the Judeo-Christian faith.*

Deposition of Def. Palmer at 7-8, Exh. 5, *Marsh* Record (emphasis added) (hereinafter "Deposition").

Nor was this an idiosyncratic definition. Throughout Rev. Palmer's chaplaincy, Black's Law Dictionary consistently defined "sect" as a group with particular religious doctrines "which distinguish them from others holding *the same general religious beliefs*," and "sectarian" as "[d]enominational" and "pertaining to, and promotive of, the interest *of a sect*," rather than the larger religion as a whole. Black's Law Dictionary 1520, 1521 (rev. 4th ed. 1968) (emphasis added); see also Black's Law Dictionary 1214 (5th ed. 1979) (identical text).

Rev. Palmer was also asked to explain in what sense his prayers were "Judeo-Christian." He replied:

> I mean that heritage which reflects the story of humankind's search for the Almighty in the pages of the Bible that has been, in essence, the heritage

> which is the founding of America's heritage as a nation which calls itself a religious nation.

Deposition at 20-21. And Palmer acknowledged that "you will find Jesus' name throughout these prayers." *Id.* at 8. Rev. Palmer's answers were entirely consistent: his prayers could be Christian, and clearly invoke the Judeo-Christian tradition, without being "sectarian."

This Court's opinion used the word "sectarian" or "nonsectarian" only once—in footnote 14, where it quoted Rev. Palmer as describing the prayers as "nonsectarian." *Marsh*, 463 U.S. at 793 n.14. Given that context, the Court's understanding of that term must be drawn from how Rev. Palmer used it in his deposition.

C. The religious content of legislative prayer is generally of no concern to courts

The holding in *Marsh* is consistent with the case's record. If the Court had wished to hold that a legislative-prayer practice with prayers that are predominantly Christian (or of any identifiable faith) are unconstitutional, it had a ready-made record to establish that point.

But the Court instead rejected the challenge without recourse to any of the standard Establishment Clause "tests." *Marsh* recited the "unambiguous and unbroken history" of legislative prayer and expressed "no doubt" that the practice was constitutional and "part of the fabric of our society." *Marsh*, 463 U.S. at 792-793.

And against the backdrop of a record replete with often "explicitly Christian" prayers, *Marsh*, 463 U.S. at 793 n.14, the Court emphasized that the content of legislative prayers—Christian, non-Christian, or otherwise—was not relevant to the practice's constitutionality. It stated:

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any

> other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Marsh, 463 U.S. at 794-795.[5] Indeed, despite a lengthy chaplaincy of a single minister of a single denomination—Rev. Palmer and his branch of Presbyterianism—this Court rejected the argument "that choosing a clergyman of one denomination advances the beliefs of a particular church." *Id.* at 793.

II. MISUNDERSTANDING *MARSH*'S RECORD HAS LED SOME COURTS TO ABROGATE *MARSH*'S HOLDING

Petitioner is correct that, under *Marsh*, it should not be dispositive whether a legislative prayer is or is not "sectarian." Pet. 9, 20-21. Judicial scrutiny is limited to whether "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-795. The division among the circuits over whether to follow this guidance, see Pet. 11-14, justifies this Court's review. But there is more. Lower courts holding that judges should evaluate the "sectarian" content of a prayer also fail to appreciate what the word "nonsectarian" means in light of *Marsh*'s holding. The Court should also grant review to clarify, and reaffirm, the limited meaning of "sectarian" in the context of legislative prayer.

A. *Marsh*'s holding should trump the *Allegheny* dictum to the extent of any conflict

The source of the confusion among the circuits lies in a brief dictum from this Court's opinion in *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). The dictum stated that the prayer practice in *Marsh* was acceptable "because the particular chaplain

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[5] Indeed, under *Lee* v. *Weisman*, 505 U.S. 577, 590 (1992), prayer content is immune from judicial scrutiny *because* of its religious nature—the opposite of the Second Circuit's approach. See Pet. 17-18.

had 'removed all references to Christ.'" *Id.* at 603 (quoting *Marsh*, 463 U.S. at 793 n.14). It suggested that identifiably Christian prayers were not a "nonsectarian reference[] to religion" but instead impermissibly affiliated the government with Christianity. *Ibid.*

But that dictum—dictum because *Allegheny* involved public holiday displays, not legislative prayer—contradicted the holding in *Marsh* and, as detailed in Part I, *supra*, misrepresented the *Marsh* record.[6] Even the Second Circuit in this case acknowledged that *Allegheny* contradicted *Marsh*. Pet. App. 17a. Yet the dictum has caused some courts to characterize any Christian prayer as impermissibly "sectarian," leading them to strike down any prayer practice in which Christian prayer predominates. See *infra* Part II.C.[7] Those courts line up either behind *Marsh* or behind *Allegheny*. Only this Court's authority to construe its own cases may re-

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[6] Nor was *Marsh* central to the holding in *Allegheny*. The Court mentioned *Marsh* only to respond to Justice Kennedy's separate opinion referencing *Marsh*.

[7] The difficulty in reconciling *Marsh* and *Allegheny* arises in a wide variety of factual contexts. *E.g.*, *Newdow* v. *Rio Linda Union School Dist.*, 597 F.3d 1007, 1035-1038 (9th Cir. 2010) (rejecting challenge to "under God" in the Pledge of Allegiance); *Newdow* v. *Roberts*, 603 F.3d 1002, 1017-1021 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (rejecting challenge to the presidential inaugural ceremony and oath's "So help me God" phrase); *Mellen* v. *Bunting*, 327 F.3d 355, 369-370 (4th Cir. 2003) (striking down Virginia Military Institute's supper prayer); *N.C. Civil Liberties Union Legal Found.* v. *Constangy*, 947 F.2d 1145, 1147-1149 (4th Cir. 1991) (holding unconstitutional a state judge's practice of opening court with prayer); *Freedom from Religion Found., Inc.* v. *Obama*, 705 F. Supp. 2d 1039, 1059-1063 (W.D. Wis. 2010), *vacated on other grounds by* 641 F.3d 803 (7th Cir. 2011) (holding that the National Day of Prayer violates the Establishment Clause); *Freedom from Religion Found., Inc.* v. *Hickenlooper*, No. 10CA2559, 2012 WL 1638718, at *14, 25-26 (Colo. Ct. App. 2012) (invalidating a governor's day-of-prayer proclamation).

solve the question of whether the perceived tension between *Marsh*'s holding and *Allegheny*'s dictum is real, as the court below and other courts have found, and, if so, how that tension should be resolved.[8]

B. The judgment below departs from *Marsh*'s holding—and would require a different outcome in *Marsh* itself

The judgment below demonstrates that the *Marsh*/*Allegheny* split has real consequences. Despite paying lip service to the idea of moving beyond a sectarian-versus-nonsectarian analysis of legislative prayer, the Second Circuit's conclusion rested on the supposedly "sectarian" nature of the prayers offered in the Town of Greece. Pet. App. 14a-17a, 21a. The court's bottom line was that the Establishment Clause was violated by "the impression, created by the steady drumbeat of often specifically sectarian Christian prayers, that the town's prayer practice associated the town with the Christian religion." Pet. App. 22a.

Applying the judgment below to the facts of *Marsh* demonstrates that either the judgment below, or *Marsh* itself, must be wrong. If the prayer practice invalidated by the Second Circuit is unconstitutional, there is no way that the Nebraska practice approved in *Marsh* could survive. *Marsh* involved a single, paid chaplain—an ordained clergyman—for 16 years, see 463 U.S. at 784-785,

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[8] For instance, this Court could read *Allegheny* to abjure "sectarian" legislative prayer as *Marsh* used that terminology. That is, if *Allegheny*'s disapproval of "sectarian" legislative prayer amounts to disapproval of a tool used only for a "specific group, cult or division of" a religion, see Deposition at 8, then it would be consistent with *Marsh*'s preclusion of "exploit[ing]" legislative prayer "to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-795. This is not the approach of the court below—and only this Court's review can instruct the lower courts whether it, or some other resolution, is the correct one.

compared to a constantly rotating cast of unpaid volunteers from many backgrounds here, see Pet. App. 4a-6a. And the ostensibly "sectarian" prayers quoted by the Second Circuit, see Pet. App. 7a, are if anything less "explicitly Christian" than prayers in the *Marsh* record, see *supra* Part I.A.

If Rev. Palmer's prayer practice were subjected to the reasoning of the Second Circuit, that court would strike it down. Presented with the Nebraska practice, it could apply its opinion here to the facts of *Marsh* by adding only the italicized words: Rev. Palmer's practice is "a steady, *sixteen-year* drumbeat of often specifically sectarian Christian prayers" that "associated *the State of Nebraska* with the Christian religion." Pet. App. 22a.

C. The conflict between *Marsh* and *Allegheny* has generated a circuit split

The court of appeals' conclusion is inconsistent with this Court's decision in *Marsh* and deepens a pre-existing circuit split. See Pet. 11-14. Some courts hew closely to *Marsh*. See, *e.g.*, *Pelphrey* v. *Cobb Cnty.*, 547 F.3d 1263, 1271 (11th Cir. 2008) (under *Marsh*, "courts are not to evaluate the content of the [legislative] prayers absent evidence of exploitation"). Other courts, purportedly faithful to *Allegheny*, expressly require precisely what this Court has never permitted: specific governmental parameters for prayer content. The most extreme example may be *Joyner* v. *Forsyth County*, 653 F.3d 341, 348, 353, 355 (4th Cir. 2011), which struck down a predominantly Christian legislative-prayer practice and instructed governments to be "proactive in discouraging sectarian prayer in public settings." And, of course, the judgment below states that a prayer practice that is sectarian may be invalid if, in the "legal judgment" of federal courts, the "totality" of the practice could convey to a reasonable observer that "the town favored or disfavored certain religious beliefs." Pet. App. 17a.

The following chart summarizes how these courts have dealt with the perceived *Marsh/Allegheny* division:

Judgment below	Christian references are impermissibly "sectarian." Pet. App. 22a.	*Allegheny* limits *Marsh*. Pet. App. 15a-22a.
Joyner v. *Forsyth County*	Christian references are impermissibly "sectarian." 653 F.3d at 349.	*Allegheny* limits *Marsh*. 653 F.3d at 347-349.
Pelphrey v. *Cobb County*	Whether prayers are "sectarian" or "non-sectarian" is not relevant. 547 F.3d at 1267.	*Marsh*'s historical analysis prevails over *Allegheny*'s dictum. 547 F.3d at 1271.

Only this Court can decide whether its holding in *Marsh* or its dictum in *Allegheny* is the law. The Court should grant review for that purpose.

III. THE JUDGMENT BELOW WILL UNJUSTIFIABLY CHILL CONSTITUTIONALLY PROTECTED LEGISLATIVE PRAYER

Legislative bodies across the United States should retain the constitutional right seen in *Marsh* as "part of the fabric of our society"—the right to "open[] legislative sessions with prayer." 463 U.S. at 492. Decisions like the Second Circuit's here, or the Fourth Circuit's in *Joyner*, cause this right to atrophy. Assemblies have already started to avoid opening sessions with invocations—*not* after freely choosing that path, but because of the ever-present threat of lawsuits. See Pet. 27. As Judge Kelly has observed in a similar context, the disarray in the law means that "governments face a Hobson's choice: forego-

ing [legislative prayer] or facing litigation. The choice most cash-strapped governments would choose is obvious, and it amounts to a heckler's veto." *Am. Atheists, Inc.* v. *Davenport*, 637 F.3d 1095, 1106 (10th Cir. 2010) (Kelly, J., dissenting from denial of rehearing *en banc*).

The Second Circuit shows solicitude for hecklers, but is a demanding and unpredictable taskmaster for towns. *Marsh* accounted for the possibility that a legislative-prayer practice could cross the line and become little more than a tool for proselytizing of a particular sect. 463 U.S. at 794-795. But *Marsh* wisely emphasized that only such extreme circumstances warranted judicial scrutiny of legislative prayers. *Ibid.* Yet, where *Marsh* established a clear rule, the court below requires a full fact-intensive judicial inquiry whenever a complaint is filed, turning long-standing legislative-prayer practices into constitutional imbroglios. And after describing how hard it will be to design or defend a constitutionally-compliant legislative prayer practice, the court below ominously warns that "[t]hese difficulties may well prompt municipalities to pause and think carefully before adopting legislative prayer." Pet. App. 27a.

The court below is right about that, at least. A reasonable town attorney in New York, Connecticut, or Vermont, seeking to avoid costly litigation over legislative prayer, is indeed left with a series of questions which yield no satisfactory answer other than "wait and see." How far away must a town look for sufficiently diverse prayer-givers? Petitioner's rational response of using a directory of any religious entity within the town was neutral, but the Second Circuit somehow found that to be an element of "endorsement." Pet. App. 19a-20a. How can a town choose whom to call, and in what order should it call them? Random lotteries and working through business directories are out, the court below says. *Ibid.*; see *id.* at 24a-25a & n.9. Should a town then call no one, instead

allowing the winds of chance to blow chaplains to the podium? What if, as here, adherents of Christianity, or some other religion, most often volunteer?

Petitioner has appropriately focused this court's attention on seventeen of the many cases struggling with the proper interpretation of *Marsh* in this context. Pet. 25-27. Each of the questions listed above, and dozens more like them, suggests that the litigation bonanza will only increase—unless, of course, town attorneys take the Second Circuit's hint and persuade their town councils to abandon the tradition of legislative prayer altogether.

This judicial hostility sharply contrasts with this Court's view that legislative prayer is "deeply embedded in the history and tradition of this country" and is "not something to be lightly cast side." *Marsh*, 463 U.S. at 786 (quotation omitted). That view should be reaffirmed.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 12-696

In the Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF ANDREW M. TOBIN, SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, ANDY BIGGS, PRESIDENT OF THE ARIZONA STATE SENATE, AND MIKE HUBBARD, SPEAKER OF THE ALABAMA HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Marsh v. Chambers,
463 U.S. 783 (1983) . . . . . *passim*

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Kerry Picket, *Hawaii Senate becomes first legislative body to end daily prayer*, Washington Times, Jan. 21, 2011, http://www.washingtontimes.com/blog/watercooler/2011/jan/21/hawaii-senate-becomes-first-legislative-body-end-d/ 13

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INTEREST OF *AMICI CURIAE*[1]

Representative Andrew M. Tobin is the Speaker of the Arizona House of Representatives. Senator Andy Biggs is the President-Elect of the Arizona State Senate. Speaker Tobin and President-Elect Biggs will serve as the presiding officers of the Fifty-First Arizona Legislature, which is the elected lawmaking authority of the State of Arizona for the years 2013 and 2014. Pursuant to the Constitution and laws of Arizona, as well as the Rules of their respective chambers, they are responsible for overseeing the daily conduct of legislative business.[2]

Legislative prayer has a long history in Arizona. The daily sessions of the constitutional convention were opened in prayer. *See, e.g.*, *The Records of the Arizona Constitutional Convention of 1910*, at 1 (John S. Goff ed., 1991) (account of the opening prayer of first day of the Convention). Since Arizona achieved statehood in 1912, both legislative chambers have opened their daily proceedings with prayer. Currently, the opening prayer is a part of the daily order of legislative business. *See* Ariz. House Rule 7 (50th Leg. 2012);

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[1] The parties consented in writing to the filing of this brief *amici curiae*. The written consent of the parties has been placed on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

[2] *See generally*, Ariz. Const art. IV, pt. 2, § 8; Ariz. Rev. Stat. § 41-1102; Ariz. House Rule 4 (50th Leg., 2012); Ariz. Senate Rule 2 (50th Leg. 2012).

Ariz. Senate Rule 16(A) (50th Leg. 2012) (Orders of Business for each chamber). The Arizona Legislature does not have a paid chaplain. The practice in the Arizona House and Senate is for opening prayers to be offered by either members or guests of the legislature. The schedule for prayer-givers is coordinated through the respective Offices of the Speaker and the President. There is no specific requirement for the content of prayers—aside from a general rule that proper order and decorum should be maintained—and prayers from a wide variety of faith traditions have been offered.

Representative Mike Hubbard is the Speaker of the Alabama House of Representatives. As Speaker he serves as the presiding officer of the 105-member chamber. Speaker Hubbard's duties include presiding over the daily legislative sessions of the House. Ala. House Rule 5. By rule, the Alabama House opens its daily sessions with prayer. *Id.* at R. 6 (Order of Business). Prayers are generally offered by members of the public and are scheduled through the Office of the Speaker *Pro Tempore*. Prayers from a broad array of faith traditions have been offered. Like Arizona, Alabama's constitutional convention began each day with an opening prayer.[3]

As the presiding officers of their respective legislative chambers *Amici* are concerned that the decision of the United States Court of Appeals for the Second Circuit will have a detrimental effect on the practice of legislative prayer by creating uncertainty

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[3] *Official Proceedings of the Constitutional Convention of the State of Alabama* (1901), http://www.legislature.state.al.us/misc/history/constitutions/1901/proceedings/1901_proceedings_vol1/1901.html.

and introducing new requirements that will prove unworkable for deliberative bodies.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Legislative prayer is a ubiquitous practice with roots that date back to the very beginning of lawmaking in this country. The vast majority of state legislatures open their daily sessions with some sort of prayer. In *Marsh v. Chambers*, this Court recognized the unique role prayer plays in lawmaking and concluded that Nebraska's practice of opening legislative sessions with an invocation delivered by a paid chaplain posed "no real threat" of unconstitutional establishment of religion.

The decision of the Second Circuit is inconsistent with *Marsh*. Without this Court's intervention it represents a sea change in the way the prayer practices of state legislatures and other deliberative bodies are reviewed by the courts. In stark contrast to this Court's approach in *Marsh*, the Second Circuit's decision below applies detailed inquiries into the selection process of prayer-givers, the content of prayers offered, and actions as well as inactions of the deliberative body—the Town of Greece.

The Second Circuit's departures from *Marsh* lead to a confusing opinion that offers no guidance to deliberative bodies seeking to continue the longstanding practice of legislative prayer. For example, the decision suggests that deliberative bodies should issue official guidelines and warnings to prayer-givers—a practice this Court did not recommend in *Marsh*. The decision claims that the use of inclusive

language—like the words "we" and "our"—is constitutionally problematic because it presumes a religious homogeneity among those present. And the decision suggests that deliberative bodies must take action to ensure that there is no "predominance" of prayers from any one faith.

Requirements such as these would transform the historic and current practice of legislative prayer into a rigid, government-superintended, ceremonial function. Faced with such stark options, some deliberative bodies may well decide to end legislative prayers rather than delve into the business of managing their form and content. Indeed, one state legislative chamber—the Hawaii Senate—has recently done just that.

The *Marsh* decision recognizes that—absent clear abuses—a practice predating the First Amendment does not conflict with the rights guaranteed by the provision. The Second Circuit's decision, on the other hand, presents significant new problems for First Amendment freedoms. Increased official oversight of religious speech does violence to both the practice of legislative prayer and First-Amendment freedoms. Indeed, as the nation continues to grow legislative prayer has served to enhance individual liberty by providing a dynamic expression of the tremendous diversity of faiths that make up the greater body politic.

ARGUMENT

I. THE PRACTICE OF OPENING LEGISLATIVE BUSINESS WITH PRAYER REMAINS A CONSTANT FEATURE OF LAWMAKING IN THE UNITED STATES

In *Marsh v. Chambers*, this Court recognized that the practice of "opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." 463 U.S. 783, 786 (1983). It reached this conclusion "[i]n light of the unambiguous and unbroken history of more than 200 years" of both the federal Congress and the legislatures of the states. *Id.* at 792. In a review of the practices of the state legislatures, this Court cited to a brief filed by the National Conference of State Legislatures ("NCSL") as *Amicus Curiae*. *Id.* at 793, n.11 (citing Brief for the NCSL as *Amicus Curiae* Not Supporting Either Party, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-23)). The NCSL Brief presented a survey of all state legislatures—apart from the Nebraska Legislature. That survey found that "[a]ll legislative bodies open their sessions with a prayer except for the Massachusetts Senate, which does so only occasionally." NCSL Brief at 2. The NCSL Brief went on to note that the authority to open in prayer is "usually found in the rules of the legislative body and is most commonly contained in the rule providing for the order of business." *Id.*

Thirty years after *Marsh*, the practice of legislative prayer remains a strong one. A 2002 NCSL survey concluded that "[a]lmost all state legislatures still use an opening prayer as part of their tradition and

procedure."[4] The leading manual on state legislative procedure includes opening prayer in the "general order of business" and calls the practice an "essential procedure established by usage" of state legislatures. P. Mason, *Manual of Legislative Procedure* ("*Mason's Manual*") §710 (2010); *compare Marsh*, 463 U.S. at 789, n. 11 (citing *Mason's Manual* § 586(2) (1979)).

II. THE OPINION BELOW SEVERELY RESTRICTS THE ABILITY OF STATE LEGISLATURES AND OTHER DELIBERATIVE BODIES TO CONTINUE THE PRACTICE OF LEGISLATIVE PRAYER

In *Marsh* this Court upheld the Nebraska Legislature's practice of beginning legislative sessions with prayers delivered by a chaplain from a specific religious denomination with public funds. The decision of the Second Circuit, by contrast, finds that the Petitioner Town's practice of opening prayers delivered by volunteers violates the Establishment Clause. The Second Circuit's approach cannot be reconciled with *Marsh*.

A. THE OPINION MATERIALLY DEPARTS FROM THIS COURT'S GUIDANCE IN *MARSH V. CHAMBERS*

The Second Circuit concluded that the Town's prayer practice impermissibly endorsed a particular religious viewpoint. It offered three general

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[4] NCSL, *Inside the Legislative Process: Prayer Practices*, Tab 5, pt. 7, at 154 (2010 ed.), http://www.ncsl.org/documents/legismgt/ilp/02tab5pt7.pdf.

"considerations" in support of its conclusion: (1) the prayer-giver selection process; (2) the content of the prayers offered; and (3) the "contextual actions (and inactions) of prayer-givers and town officials." *Galloway v. Town of Greece*, 681 F.3d 20, 30 (2d Cir. 2012). None of these considerations find support in this Court's decision in *Marsh*.

First, the Second Circuit asserted that "[t]he town's process for selecting prayer-givers virtually ensured a Christian viewpoint." *Id.* at 31. "In our view," the Second Circuit explained, "whether a town's prayer-selection process constitutes an establishment of religion depends on the extent to which the selection process results in a perspective that is substantially neutral amongst creeds." *Id.* (emphasis added). In *Marsh*, the prayer-giver selection process consisted of the biennial selection of a chaplain that resulted in the same individual, from a specific Christian denomination, being appointed as chaplain and delivering the prayers for over 16 years. *Marsh*, 463 U.S. at 784-85. The *Marsh* selection process was significantly less "random" than the volunteer rotation condemned by the Second Circuit; and it resulted in significantly less religious diversity. *Cf. Galloway*, 681 F.3d at 31.

Second, the Second Circuit made a detailed evaluation of the content of the prayers offered by volunteers to open Town meetings. The Court noted that "[a] substantial majority of the prayers in the record contained uniquely Christian language." *Id.* at 24. It also noted that other prayers "spoke in more generically theistic terms." *Id.* For the Second Circuit, the distinction between specific and more general religious language was constitutionally significant. *Id.*

at 31. Yet, the Court admitted that "[t]he prayers in the record were not offensive in the way identified as problematic in *Marsh:* they did not preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like." *Id.* at 31-32. Having raised specific concerns regarding the language of the prayers, the Court purported to stop short of basing its ruling exclusively on that basis. "[W]e need not determine whether any single prayer at issue here suffices to give such an indication of establishment, since we find that on the totality of the circumstances presented the town's prayer practice identified the town with Christianity in violation of the Establishment Clause." *Id.* at 32. As a whole, the Second Circuit's searching examination and detailed discussion departs from this Court's careful warning about judicial review of the content of prayers.

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Marsh, 463 U.S. at 794-95.

The Second Circuit's third consideration—what it called the "contextual actions (and inactions) of prayer-givers and town officials"—is also a departure from *Marsh*. *Galloway*, 681 F.3d at 30. As previously noted, the Court admitted that the record did not contain evidence of prayers "offensive in the way identified as problematic in *Marsh*." *Id.* at 31-32. Nevertheless, the Court faulted the Town for not warning prayer-givers

to avoid proselytizing or disparaging other faiths. *Id.* at 32. The *Marsh* decision, of course, requires no such warning and would limit any official oversight to instances where the opportunity to give a prayer is being exploited. *Marsh*, 463 U.S. at 794-95.

Even more strangely, the Second Circuit went on to decry the tendency of prayer-givers to "sp[eak] in the first-person plural: let 'us' pray, 'our' savior, 'we' ask, an[d] so on." *Galloway*, 681 F.3d at 32. But this is exactly the kind of prose this Court declined to parse in *Marsh*. In fact—as Justice Stevens noted in his dissent—the Nebraska chaplain also employed the first-person plural tense: "[Y]our son brought life to the whole world moving our hearts to praise your glory. . . ;" "[w]e celebrate the great event of our redemption;" We are reminded of the price he paid. . . ." *See Marsh*, 463 U.S. at 823, n.2 (Stevens J., dissenting)) (emphasis added). The Second Circuit's assertion that the use of such language is "relevant, and worthy of weight," *Galloway*, 681 F.3d at 32, is yet another proof that it was applying a standard separate and apart from *Marsh*.

To be sure, unity despite differences is part of the value of legislative prayer. The practice is not an ancient tradition that blindly presumes religious uniformity. From the Founding, legislative prayer has provided shared moments of solemnization by individuals of different faiths. To take this Court's example, Samuel Adams responded to calls to abandon legislative prayers as being too divisive by saying that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country." *See Marsh*, 463 U.S. at 792. Then, as now, the multiplicity of faiths is reason

to maintain the practice of legislative prayer not to abandon it.

B. THE OPINION BELOW IS VAGUE, CONTRADICTORY, AND PROVIDES AN UNWORKABLE STANDARD

In addition to its abandonment of this Court's guidance in *Marsh*, the Second Circuit's decision should be addressed by this Court for the sheer amount of confusion it would inflict upon legislatures and other deliberative bodies. The decision shifts its rationale from one consideration to the other, frequently noting that no one consideration is dispositive.

> It is true that contextual inquiries like this one can give only limited guidance to municipalities that wish to maintain a legislative prayer practice and still comply with the mandates of the Establishment Clause. As the foregoing indicates, a municipality cannot—in our judgment—ensure that its prayer practice complies with the Establishment Clause simply by stating, expressly, that it does not mean to affiliate itself with any particular faith. Nor can a municipality insulate itself from liability by adopting a lottery to select prayer-givers or by actively pursuing prayer-givers of minority faiths whose members reside within the town. Similarly, there is no substantive mixture of prayer language that will, on its own, necessarily avert the appearance of affiliation.

Galloway, 681 F.3d at 33 (notes omitted). The suggestion that this passage offers even "limited guidance" is a bold one. The Court essentially attaches

a disclaimer to each of the areas it detailed as a problem for the Town: "This will not necessarily fix the problem." This equivocation contrasts sharply with this Court's lapidary language in *Marsh*. "To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792 (emphasis added). Certainly it is true that Establishment Clause inquiries entail a specific review of the facts and circumstances of the challenged practice. But the overall context, an "unbroken practice for two centuries," is no stranger to the American polity. In the absence of concrete abuses, legislative prayer offers "no real threat" of impermissible Establishment. *Id.* at 794. The Second Circuit's searching review of the practices of the Town fails to treat legislative prayer as a venerable practice approved by "the men who wrote the First Amendment Religion Clause. . . ." *Id.* at 789.

Another difficulty created by the Second Circuit's approach is the suggestion that the Establishment Clause requires government actors to strive to balance the number of prayer-givers from various religious traditions.

> In the town's view, the preponderance of Christian clergy was the result of a random selection process. The randomness of the process, however, was limited by the town's practice of inviting clergy almost exclusively from places of worship located within the town's borders. The town fails to recognize that its residents may hold religious beliefs that are not

> represented by a place of worship within the town.

Galloway, 681 F.3d at 31. It is unworkable to require a deliberative body to engage in the sensitive task of balancing multiple prayers from religious traditions. Nothing in the *Marsh* decision suggests such a requirement. And—like the parsing of the religious content of prayers—it increases the risk that governmental authority will be entangled in the religious views of individual citizens.

C. THE OPINION BELOW IMPAIRS THE ABILITY OF DELIBERATIVE BODIES TO ACCOMMODATE AND ADVANCE RELIGIOUS PLURALISM

The Second Circuit's approach is also unworkable because it raises new barriers to the accommodation of the diverse range of religious views necessarily entailed in lawmaking at the state and local level. Many of the Second Circuit's criticisms focus on the difficulties of the practice of involving members of the public in the opening-prayer process. The Court even goes so far as to suggest that it would be easier to not involve volunteers from the public.

> People with the best of intentions may be tempted, in the course of giving a legislative prayer, to convey their views of religious truth, and thereby run the risk of making others feel like outsiders. Even if all prayer-givers could resist this temptation, municipalities with the best of motives may still have trouble preventing the appearance of religious affiliation. Ours is a society splintered, and joined, by a wide a

> constellation of religious beliefs and non-beliefs. Amidst these many viewpoints, even a single circumstance may appear to suggest an affiliation. To the extent that the state cannot make demands regarding the content of legislative prayers, moreover, municipalities have few means to forestall the prayer-giver who cannot resist the urge to proselytize. These difficulties may well prompt municipalities to pause and think carefully before adopting legislative prayer, but they are not grounds on which to preclude its practice.

Galloway, 681 F.3d at 34. Citing similar concerns, one state legislative body has recently abandoned the practice of legislative prayer.[5]

There is another approach. Consistent with this Court's decision in *Marsh*, deliberative bodies should (1) recognize the important role legislative prayer plays in the lawmaking process; (2) provide an opportunity for prayer-givers to invoke divine blessing in their own words and from their own tradition; and (3) limit the official hand of restraint to those rare occasions when an individual exploits the opportunity by assailing the religious traditions of others. Unlike the approach of the Second Circuit, *Marsh* harmonizes the venerable practice of legislative prayer with the diverse range of religious views and backgrounds. The practice of legislative prayer does not continue "without regard to

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[5] *See* Kerry Picket, *Hawaii Senate becomes first legislative body to end daily prayer*, Washington Times, Jan. 21, 2011, http://www.washingtontimes.com/blog/watercooler/2011/jan/21/hawaii-senate-becomes-first-legislative-body-end-d/

the problems posed by a pluralistic society." *Marsh*, 463 U.S. at 791. It continues to flourish because it gives expression to faith differences.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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JOINT APPENDIX

Supreme Court, U.S.
FILED
JUL 26 2013
OFFICE OF THE CLERK

No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Second Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 6, 2012
CERTIORARI GRANTED MAY 20, 2013

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Transcript of Prayer Portions of Town Board Meeting, Aug. 18, 2009, Supplemental Exhibit 622 filed by Plaintiffs (W.D.N.Y. Aug. 31, 2009) 137a

Transcript of Prayer Portions of Town Board Meeting, Sept. 15, 2009, Supplemental Exhibit 623 filed by Plaintiffs (W.D.N.Y. Sept. 29, 2009) 138a

Transcript of Prayer Portions of Town Board Meeting, Dec. 15, 2009, Supplemental Exhibit 624 filed by Plaintiffs (W.D.N.Y. Jan. 6, 2010) 139a

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The following documents have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the petition for a writ of certiorari:

Opinion of the United States Court of Appeals for the Second Circuit (May 17, 2012) 1a

Opinion of the United States District Court for the Western District of New York (Aug. 5, 2010) 28a

Order of the United States Court of Appeals for the Second Circuit Denying *En Banc* Rehearing (Aug. 8, 2012) 132a

General Docket
Court of Appeals, 2nd Circuit

Court of Appeals Docket #: 10-3635	**Docketed:**
Nature of Suit: 3440 CIVIL RIGHTS-Other	09/09/2010
Susan Galloway v. Town of Greece	**Termed:**
Appeal From: WDNY	05/17/2012
Fee Status: Paid	

Case Type Information:
1) Civil
2) Private
3) -

Originating Court Information	
District: 0209-6 : 08-cv-6088	
Trial Judge: Charles J. Siragusa, U.S. District Judge	
Trial Judge: Marian W. Payson, U.S. Magistrate Judge	
Date Filed: 02/28/2008	**Date NOA Filed:**
Date Order/Judgment: 08/10/2010	09/03/2010

Prior Cases:
None
Current Cases:
None

* * *

09/09/2010	1	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Susan Galloway and Linda Stephens, FILED. [103738] [10-3635]

09/09/2010	2	DISTRICT COURT JUDGMENT, dated 08/10/2010, RECEIVED. [103743] [10-3635]
		* * *
10/04/2010	22	SO-ORDERED SCHEDULING NOTIFICATION, setting Appellant Susan Galloway and Linda Stephens: Brief due on 01/14/2011. Joint Appendix due on 01/14/2011, FILED. [118337] [10-3635]
		* * *
12/15/2010	33	BRIEF, on behalf of Appellant Susan Galloway and Linda Stephens, FILED. Service date 12/15/2010 by CM/ECF. [168130] [10-3635]
12/15/2010	34	APPENDIX, on behalf of Appellant Susan Galloway and Linda Stephens, FILED. Service date 12/15/2010 by CM/ECF. [168217] [10-3635]
12/15/2010	35	SPECIAL APPENDIX, on behalf of Appellant Susan Galloway and Linda Stephens, FILED. Service date 12/15/2010 by CM/ECF. [168220] [10-3635]
12/16/2010	36	DEFECTIVE DOCUMENT, BRIEF, SPECIAL APPENDIX, and APPENDIX, [33], [34], [35], on behalf of Appellant Susan Galloway and Linda Stephens, FILED. [169001] [10-3635]

12/16/2010	37	BRIEF, on behalf of Appellant Susan Galloway and Linda Stephens, FILED. Service date 12/15/2010 by CM/ECF. [169059] [10-3635]
12/16/2010	38	SPECIAL APPENDIX, on behalf of Appellant Susan Galloway and Linda Stephens, FILED. Service date 12/15/2010 by CM/ECF. [169064] [10-3635]
12/16/2010	39	JOINT APPENDIX, VOL. I -- [Edited 12/20/2010 by DH] on behalf of Appellant Susan Galloway and Linda Stephens, FILED. Service date 12/15/2010 by CM/ECF. [169098] [10-3635]
12/16/2010	40	JOINT APPENDIX, VOL. II -- [Edited 12/20/2010 by DH] on behalf of Appellant Susan Galloway and Linda Stephens, FILED. Service date 12/15/2010 by CM/ECF. [169109] [10-3635]
12/17/2010	41	MOTION, for filing of --[Edited 12/17/2010 by DH] Non-Conforming Exhibits, on behalf of Appellant Susan Galloway and Linda Stephens, FILED. Service date 12/17/2010 by CM/ECF. [169737] [10-3635]
12/20/2010	45	MOTION ORDER, granting motion for leave to file copies of DVDs for inclusion in the joint appendix, filed by Appellant Susan Galloway and Linda Stephens, [41], FILED. [170799] [45] [10-3635]

12/20/2010	46	DEFECTIVE DOCUMENT Brief, Special Appendix and Appendix [36], on behalf of Appellant Susan Galloway and Linda Stephens, CURED. [170856] [10-3635]
12/21/2010	52	LETTER, dated 12/17/2010, confirming three full sets of DVDs (three boxes) forwarded to the Court, on behalf of Appellant Susan Galloway and Linda Stephens, RECEIVED. Service date 12/17/2010 by US mail. [171925] [10-3635]

* * *

12/29/2010	54	SO-ORDERED SCHEDULING NOTIFICATION, setting Appellee John Auberger and Town of Greece Brief due date as 03/16/2011, FILED. [175397] [10-3635]
03/16/2011	56	BRIEF, on behalf of Appellee John Auberger and Town of Greece, FILED. Service date 03/16/2011 by email, US mail, CM/ECF. [236563] [10-3635]
03/21/2011	57	DEFECTIVE DOCUMENT, BRIEF [56], on behalf of Appellee John Auberger and Town of Greece, FILED. [239102] [10-3635]

* * *

03/22/2011	65	BRIEF, on behalf of Appellee John Auberger and Town of Greece, FILED. Service date 03/22/2011 by CM/ECF. [241356] [10-3635]
		* * *
03/23/2011	71	NEW PARTY, Amicus Curiae WallBuilders, Inc., ADDED. [242257] [10-3635]
		* * *
03/23/2011	73	NEW PARTY, Amicus Curiae Liberty Institute, ADDED. [242291] [10-3635]
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03/23/2011	76	AMICUS BRIEF, Liberty Institute, FILED. Service date serviceTextdate,.,SKIP) [242467] [10-3635]--[Edited 03/24/2011 by DH]
03/23/2011	77	AMICUS BRIEF, Foundation for Moral Law, FILED. Service date serviceTextdate,.,SKIP) [242609] [10-3635]--[Edited 03/24/2011 by DH]--[Edited 03/24/2011 by DH]
		* * *
03/24/2011	79	NEW PARTY, Amicus Curiae Foundation for Moral Law, ADDED. [243306] [10-3635]--[Edited 03/24/2011 by DH]

03/24/2011	80	CURED DEFECTIVE DOCUMENT Brief [57], on behalf of Appellee John Auberger and Town of Greece, FILED. [243332] [10-3635]
		* * *
03/24/2011	87	AMICUS BRIEF, WallBuilders, Inc., FILED. Service date serviceTextdate,.,SKIP) [243880] [10-3635]--[Edited 03/24/2011 by DH]
		* * *
04/13/2011	101	REPLY BRIEF, on behalf of Appellant Susan Galloway and Linda Stephens, FILED. Service date 04/13/2011 by CM/ECF. [261770] [10-3635]
		* * *
05/10/2011	111	LETTER, dated 05/10/2011, on behalf of Appellee John Auberger and Town of Greece, RECEIVED. Service date 05/10/2011 by CM/ECF. [285221] [10-3635]
		* * *
07/28/2011	119	CASE CALENDARING, for argument on 09/12/2011, SET. [350386] [10-3635]
		* * *

08/09/2011	121	FRAP 28(j) LETTER, dated 08/09/2011, on behalf of Appellant Susan Galloway and Linda Stephens, RECEIVED. Service date 08/09/2011 by CM/ECF. [361047] [10-3635]
08/09/2011	122	FRAP 28(j) LETTER, dated 08/09/2011, on behalf of Appellant Susan Galloway and Linda Stephens, RECEIVED. Service date 08/09/2011 by CM/ECF. [361048] [10-3635]

* * *

09/12/2011	127	CASE, before GC, RCW*, GEL, C.JJ., HEARD. [387727] [10-3635]

* * *

05/17/2012	132	OPINION, reversing the district court's grant of summary judgment and remanding the case for further proceedings consistent with this opinion, by GC., RCW., GEL., FILED. [612287] [10-3635]

* * *

05/17/2012	134	CERTIFIED OPINION, dated 05/17/2012, to WDNY (ROCHESTER), ISSUED. [612309] [10-3635]--[Edited 07/17/2012 by YS]
05/17/2012	137	JUDGMENT, FILED. [614736] [10-3635]

05/30/2012	138	PETITION FOR REHEARING/REHEARING EN BANC, on behalf of Appellee Town of Greece, FILED. Service date 05/30/2012 by CM/ECF. [623880] [10-3635]
		* * *
06/06/2012	147	MOTION TO FILE AMICUS CURIAE BRIEF, on behalf of Non-Party Filer(s), FILED. Service date 06/06/2012 by CM/ECF. [630370] [10-3635]
06/06/2012	148	AMICUS BRIEF, on behalf of Foundation for Moral Law, FILED. Service date 06/06/2012 by CM/ECF. [630372] [10-3635]--[Edited 06/13/2012 by YS]
06/13/2012	153	MOTION ORDER, granting non party amicus motion to file amicus curiae brief and for permission to file an oversized brief [147], by RCW., FILED. [636017] [153] [10-3635]--[Edited 07/17/2012 by YS]
08/08/2012	157	ORDER, petition for rehearing en banc denied, FILED. [685931] [10-3635]
08/16/2012	158	JUDGMENT MANDATE, ISSUED. [693859] [10-3635]
		* * *

10/26/2012	162	U.S. SUPREME COURT NOTICE, granting Appellee Town of Greece extension to file Writ of Certiorari, FILED. [758543] [10-3635]
05/20/2013	163	U.S. SUPREME COURT NOTICE, dated 05/20/2013, U.S. Supreme Court docket # 12-696, stating the petition for writ of certiorari is granted, RECEIVED. [943210] [10-3635]

U.S. DISTRICT COURT
U.S. District Court, Western District of New York (Rochester)
CIVIL DOCKET FOR CASE #: 6:08-cv-06088-CJS-MWP

Galloway et al v. Town of Greece et al
Assigned to: Hon. Charles J. Siragusa
Referred to: Hon. Marian W. Payson
Cause: 42:1983 Civil Rights Act

Date Filed: 02/28/2008
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

* * *

Date Filed	#	Docket Text
02/28/2008	1	COMPLAINT against Town of Greece and John Auberger (Filing fee $350.00 receipt number ROC001645), filed by Susan Galloway and Linda Stephens. (RE) (Entered: 02/29/2008)

* * *

03/26/2008	4	ANSWER to 1 Complaint by Town of Greece, John Auberger. (Behr, Laurence) (Entered: 03/26/2008)

* * *

03/27/2008	7	ORDER REFERRING CASE to Magistrate Judge Marian W. Payson. Full pretrial, no dispositive motions. Signed by Hon. Charles J. Siragusa on 3/27/08. (RAZ) (Entered: 03/27/2008)

* * *

07/24/2008	26	ORDER & AMENDED SCHEDULING ORDER granting 25 Joint Motion to Amend Discovery Order. Telephone Status Conference adjourned to **10/7/2008 at 10:20 AM**. The parties are directed to call chambers at (585) 613-4080. Motions to Join/Add Parties due by 9/5/2008. Fact Discovery to be completed by 10/20/2008. Plaintiffs' Expert ID due by 9/5/2008. Defendants' Expert ID due by 9/19/2008. Expert Discovery to be completed by 10/20/2008. Dispositive Motions due by 1/20/2009. Signed by Hon. Marian W. Payson on 7/24/2008. (KAH) Modified on 7/24/2008 (KAH). (Entered: 07/24/2008)

* * *

01/20/2009	32	MOTION for Summary Judgment by Susan Galloway, Linda Stephens. (Attachments: # 1 Memorandum in Support Plaintiffs' Memorandum in Support of Motion for Summary Judgment,

		# 2 Supplement Plaintiffs' Statement of Material Facts, # 3 Appendix Table of Contents for Appendix of Exhibits, # 4 Appendix Exhibits, pt. 1, # 5 Appendix Exhibits, pt. 2, # 6 Appendix Exhibits, pt. 3, # 7 Appendix Exhibits, pt. 4, # 8 Appendix Exhibits, pt. 5, # 9 Appendix Exhibits, pt. 6, # 10 Appendix Exhibits, pt. 7, # 11 Appendix Exhibits, pt. 8, # 12 Appendix Exhibits, pt. 9, # 13 Appendix Exhibits, pt. 10, # 14 Appendix Exhibits, pt. 11, # 15 Appendix Exhibits, pt. 12, # 16 Appendix Exhibits, pt. 13, # 17 Appendix Exhibits, pt. 14, # 18 Appendix Exhibits, pt. 15, # 19 Appendix Exhibits, pt. 16, # 20 Appendix Exhibits, pt. 17, # 21 Appendix Exhibits, pt. 18, # 22 Appendix Exhibits, pt. 19, # 23 Appendix Exhibits, pt. 20, # 24 Appendix Exhibits, pt. 21, # 25 Appendix Exhibits, pt. 22, # 26 Appendix Exhibits, pt. 23, # 27 Appendix Exhibits, pt. 24, # 28 Appendix Exhibits, pt. 25, # 29 Appendix Exhibits, pt. 26, # 30 Appendix Exhibits, pt. 27, # 31 Appendix Exhibits, pt. 28, # 32 Appendix Exhibits, pt. 29, # 33 Appendix Exhibits, pt. 30, # 34 Appendix Exhibits, pt. 31, # 35 Appendix Exhibits, pt. 32,

		# 36 Appendix Exhibits, pt. 33, # 37 Appendix Exhibits, pt. 34, # 38 Appendix Exhibits, pt. 35, # 39 Appendix Exhibits, pt. 36, # 40 Appendix Exhibits, pt. 37, # 41 Appendix Exhibits, pt. 38, # 42 Appendix Exhibits, pt. 39, # 43 Appendix Exhibits, pt. 40, # 44 Appendix Exhibits, pt. 41, # 45 Appendix Exhibits, pt. 42, # 46 Appendix Exhibits, pt. 43, # 47 Appendix Exhibits, pt. 44, # 48 Appendix Exhibits, pt. 45, # 49 Appendix Exhibits, pt. 46, # 50 Appendix Exhibits, pt. 47, # 51 Appendix Exhibits, pt. 48, # 52 Appendix Exhibits, pt. 49, # 53 Appendix Exhibits, pt. 50, # 54 Appendix Exhibits, pt. 51, # 55 Appendix Exhibits, pt. 52, # 56 Appendix Exhibits, pt. 53, # 57 Appendix Exhibits, pt. 54) (Katskee, Richard) (Entered: 01/20/2009)

01/20/2009	33	MOTION for Summary Judgment by Town of Greece, John Auberger. (Attachments: # 1 Memorandum in Support, # 2 Defendants' Statement of Facts, # 3 Appendix, # 4 Exhibit 1, # 5 Exhibit 2, # 6 Exhibit 3, # 7 Exhibit 4, # 8 Exhibit 5, # 9 Exhibit 6, # 10 Exhibit 7, # 11 Exhibit 8, # 12 Exhibit 9, # 13 Exhibit 10, # 14 Exhibit 11, # 15 Exhibit 12, # 16 Exhibit 13, # 17 Exhibit 14, # 18 Certificate of Service) (Oster, Joel) (Entered: 01/20/2009)

* * *

03/05/2009	36	AMENDED MOTION SCHEDULING ORDER re 33 MOTION for Summary Judgment filed by John Auberger, Town of Greece and 32 MOTION for Summary Judgment filed by Susan Galloway, Linda Stephens. Responses due by 4/10/2009. Replies due by 5/15/2009. Motion Hearing set for 8/13/2009 03:00 PM before Hon. Charles J. Siragusa. Signed by Hon. Charles J. Siragusa on 3/3/09. (RAZ) (Entered: 03/05/2009)

04/10/2009	37	RESPONSE in Opposition re 32 MOTION for Summary Judgment filed by Town of Greece, John Auberger. (Attachments: # 1 Defendants' Response to Plaintiffs' Statement of Material Facts, # 2 Exhibit 15 Tajkowski Aff, # 3 Exhibit 16 - Anthony Aff, # 4 Exhibit 17 - Sofia Aff, # 5 Exhibit 18 - Firkins Aff, # 6 Exhibit 19 - Answer) (Oster, Joel) (Entered: 04/10/2009)
04/10/2009	38	RESPONSE in Opposition re 33 MOTION for Summary Judgment filed by Susan Galloway, Linda Stephens. (Attachments: # 1 Supplement Plaintiffs' Response to Defendants' Statement of Undisputed Facts, # 2 Exhibit Plaintiffs' Supplemental Appendix) (Katskee, Richard) (Entered: 04/10/2009)

* * *

05/29/2009	43	REPLY to Response to Motion re 32 MOTION for Summary Judgment filed by Susan Galloway, Linda Stephens. (Attachments: # 1 Appendix Second Supplemental Appendix) (Katskee, Richard) (Entered: 05/29/2009)

05/29/2009	44	REPLY to Response to Motion re 33 MOTION for Summary Judgment filed by Town of Greece, John Auberger. (Oster, Joel) (Entered: 05/29/2009)
08/06/2009	45	Consent MOTION for Leave to File *Additional Exhibits in Support of Motion for Summary Judgment* by Susan Galloway, Linda Stephens. (Attachments: # 1 Exhibit Additional Exhibits) (Katskee, Richard) (Entered: 08/06/2009)

* * *

08/13/2009	47	Minute Entry for proceedings held before Hon. Charles J. Siragusa: Richard Katskee, Corrine Rice and David Jay appearing on behalf of plaintiff. Joel Olster appearing on behalf of defendants. Motion Hearing held on 8/13/2009 re 33 MOTION for Summary Judgment filed by John Auberger, Town of Greece, 32 MOTION for Summary Judgment filed by Susan Galloway, Linda Stephens, Motions Submitted: 33 MOTION for Summary Judgment, 32 MOTION for Summary Judgment. Court reserves and will render written decision. (Court Reporter Karen Bush.) (KJA) (Entered: 08/14/2009)

* * *

08/31/2009	49	MOTION for Leave to File *Additional Exhibits in Support of Motion for Summary Judgment* by Susan Galloway, Linda Stephens. (Attachments: # 1 Exhibit Additional Exhibits) (Katskee, Richard) (Entered: 08/31/2009)
09/29/2009	50	MOTION for Leave to File *Additional Exhibits in Support of Motion for Summary Judgment* by Susan Galloway, Linda Stephens. (Attachments: # 1 Exhibit Additional Exhibits) (Katskee, Richard) (Entered: 09/29/2009)

* * *

01/06/2010	52	MOTION for Leave to File *Additional Exhibits in Support of Motion for Summary Judgment* by Susan Galloway, Linda Stephens. (Attachments: # 1 Exhibit Additional Exhibits) (Katskee, Richard) (Entered: 01/06/2010)

* * *

07/01/2010	54	MOTION for Leave to File *Additional Exhibits in Support of Motion for Summary Judgment* by Susan Galloway, Linda Stephens. (Attachments: # 1 Exhibit Additional Exhibits) (Katskee, Richard) (Entered: 07/01/2010)

* * *

08/05/2010	56	ORDER granting 45 Motion for Leave to File; granting 49 Motion for Leave to File; granting 50 Motion for Leave to File; granting 52 Motion for Leave to File; granting 54 Motion for Leave to File. Signed by Hon. Charles J. Siragusa on 8/4/10. (KAP) (Entered: 08/05/2010)
08/05/2010	57	DECISION AND ORDER denying 32 plaintiffs' Motion for Summary Judgment; granting 33 Defendants' Motion for Summary Judgment. This action is dismissed. Signed by Hon. Charles J. Siragusa on 8/5/10. (KAP) (Entered: 08/05/2010)
08/10/2010	58	JUDGMENT dismissing the action. Signed by Michael J. Roemer, Clerk of Court, on 8/10/10. (RE) (Entered: 08/10/2010)
09/03/2010	60	NOTICE OF APPEAL as to 58 Judgment by Susan Galloway, Linda Stephens. Filing fee $455.00 was paid, receipt ROC004368. The appeal was filed on 9/3/10 and the fee paid on 9/9/10. (BK) (Entered: 09/09/2010)

* * *

10/07/2010	61	CLERKS CERTIFICATE/INDEX to record on appeal 60 filed and electronically sent to Court of Appeals. (BK) (Entered: 10/07/2010)
05/21/2012	62	USCA JUDGMENT as to 60 Notice of Appeal filed by Susan Galloway, and Linda Stephens. District Courts summary judgment is reversed, and the case is remanded for further proceedings. (BK) (Entered: 05/21/2012)
06/07/2012	63	ORDER. ORDERED, that within thirty days of entry of this Order, Plaintiffs and Defendants shall each submit a written statement, not exceeding ten pages in length, proposing relief that is appropriate in view of the guidance provided in the Second Circuits decision.. Signed by Hon. Charles J. Siragusa on 6/5/12. (KAP) (Entered: 06/07/2012)
06/29/2012	64	Joint MOTION to Stay re 63 Order, by John Auberger, Town of Greece. (Oster, Joel) (Entered: 06/29/2012)

* * *

07/11/2012	66	ORDER granting 64 Motion to Stay. Time frame for submission of the parties' statements be modified to be filed within 30 days of the date on which the mandate is issued by the appellate court. Signed by Hon. Charles J. Siragusa on 7/10/12. (KAP) (Entered: 07/11/2012)
08/16/2012	67	MANDATE of USCA as to 60 Notice of Appeal filed by Susan Galloway, and Linda Stephens. It is hereby Ordered, Adjudged, and Decreed that the judgment of District Court is Reversed and the case is Remanded to District Court. (BK) (Entered: 08/16/2012)
09/07/2012	68	MOTION to Amend/Correct 66 Order on Motion to Stay, *Joint Motion to Amend Order* by John Auberger, Susan Galloway, Linda Stephens, Town of Greece. (Oster, Joel) (Entered: 09/07/2012)

* * *

09/17/2012	70	CONSENT ORDER granting 68 Motion to Amend or Correct. Signed by Hon. Charles J. Siragusa on 9/14/12. (KAP) (Entered: 09/17/2012)

* * *

Plaintiff's Written Complaints About Prayer Practice and Defendants' Responses, Exhibits 71-74 to Plaintiffs' Motion for Summary Judgment (W.D.N.Y. Jan. 20, 2009)

[Email from Scott Forsyth to Ray Diraddo, March 26, 2007 10:36 AM]

Dear Ray,

I am writing you as counsel to the local chapter of the ACLU. The local office received a complaint about the Town Board's practice of beginning each meeting with a prayer. The complaintant took offense at the practice because she believed that the content of the prayers was overly Christian.

At the last meeting of the legal committee of the chapter we reviewed video of several prayers and determined that there is merit to the complaint. Besides references to Father, God, Lord God, and the Almighty, which are acceptable, several ministers invoked the name of Jesus Christ, the Holy Spirit, and the Holy Trinity. The latter are not acceptable and put the town in the position of advancing a particular religion, Christianity, to the detriment of others. This is a violation of the Establishment Clause. For authority for our view I refer you to the attached decision, Wynne v Town of Great Falls, out of the conservative Fourth Circuit.

We do not ask you to discontinue the practice of opening sessions with a prayer. Congress does this and it has a long history of doing so. However, as Wynne points out, your prayer must be nonsectarian. We know that the prayer leaders are volunteers but you should guide them on what they can say and not

say since they are praying at a public gathering. A written policy may be helpful. Also you should invite nonChristian ministers to conduct some of the prayers. You may have to reach outside the town of Greece to find some of these ministers.
Scott

[Letter from Raymond S. DiRaddo to Scott A. Forsyth, May 10, 2007]

Dear Scott:

Thank you very much for providing the cases and material regarding use of sectarian invocations to open public governmental meetings. I have also researched this issue and have determined the Town Board's compliance with existing case law and established precedent.

As you know, the Greece Town Board opens its meetings with a request from a member of the local clergy to invoke divide guidance in the decisions that the Board makes on that particular evening.

The Town Board does not and has not requested any of its invitees to advance any religion or to despair any other faith or belief. The Town of Greece does not control the content of the prayer or the vocabulary of the particular individual who gives the invocation. The Board deems that directly controlling the content of the prayer inhibits the religious freedoms and the freedom of expression, both rights protected by the first amendment. The Board simply requests the clergy to begin our meeting with a prayer.

Our selection process involves various churches, temples, and synagogues, if any within the faith

community of the Town of Greece. We merely inquire whether or not the particular individual cleric that represents the Greece Faith Community is interested in providing a prayer to give the board member guidance it its deliberations. The Town Beard does not hold these individuals to any content standard or guidelines of their prayer.

It should be further pointed out that the clerics that give the invocation are representative of the Greece faith community, not one denomination. Furthermore the cleric is not paid any sum for the invocation.

Accordingly the Greece Town Board takes the position that it is not advancing any religion or taking preference one over the other. Their present policy, as outlined above, will continue.

I do appreciate your correspondence, and information regarding this issue.

Sincerely,

s/

Raymond S. DiRaddo

Town Attorney

[Email from Scott Forsyth to Ray Diraddo, June 4, 2007 12:22 PM]

Ray,

This column ran last Friday in the DR under the title "What's the problem with a little prayer?" Cute title but not my doing. Ditto the picture of the clasped hands that appeared inside.

As I see it the gist of a new town policy must come straight from Marsh. Clergy may present the prayer but the prayer must not "proselytize or advance any one, or disparage any other, faith or belief." This quote was part of the policy adopted by Chesterfield board.

I do not think where you place the prayer in the order of business makes the prayer something other than a benediction in the tradition of legislative prayer. In fact pushing it outside the facts of the generous case law surrounding leg prayer may invite an entanglement challenge, which the dissent in Marsh argued.

Scott

[Letterhead of Town of Greece
Letter from John T. Auberger
to Scott A. Forsyth,
June 20, 2007]

Dear Mr. Forsyth:

I am writing in response to previous correspondence with Greece Town Attorney Raymond DiRaddo regarding prayers being said before the start of Town Board meetings.

As you know, the Greece Town Board opens its meetings with a prayer from a Greece clergy member seeking divine guidance in the decisions the board makes. We do not request our invited clergy to advance any particular faith or denomination. The Town does not control the content of the prayers given, nor does it place restrictions or guidelines on these prayers. The board believes such control would inhibit religious freedom and freedom of speech, both rights protected by the constitution.

We invite Greece clergy from a list provided in the Greece Post on a rotating basis. While it has never been requested, if someone from a faith not listed in the Greece Post requested a prayer led by someone of their faith, we would make an effort to accommodate that request.

It is therefore the Town's position that we are not advancing any religion or giving preference to any one faith over another. Accordingly. It is our intent to continue our current practice.

Sincerely,

s/
John T. Auberger
Supervisor

Transcripts of Prayer Portions of Town Board Meetings, 1999-2008, Exhibits 501-614 to Plaintiffs' Motion for Summary Judgment (W.D.N.Y. Jan. 20, 2009)

1/5/99

Auberger: "Please remain standing at this time for moment of silent prayer. Keep in your thoughts and prayers our Greece residents who have since [*sic*] passed since our last meeting. Also keep in mind Mr. Sam Sarrone [sp?] in your thoughts and prayers."

Auberger and TB members bow heads and are silent.

Auberger: "Thank you"

1/19/99

Auberger: "If you would remain standing for a moment of silent prayer. Keep in your thoughts and prayers those Greece residents who have left us since our last meeting, particularly George Giodano, father of our police officer who passed away recently."

Auberger and TB members bow heads and are silent.

Auberger: "Thank you"

2/16/99

Auberger: "If you would still please remain standing for a moment of silent prayer. Keep in your thoughts and prayers this evening the memory and the family of Charles and Irma Terisi [sp?] who passed away suddently via a tragic car accident on February 12. Our thoughts and our prayers go out to

the Terisi family. And also keep in your thoughts and prayers the mother of our Highway Department employee Bob Bouchard, and also the mother of our Highway employee Jim Brady who passed away since our last meeting."

Auberger and TB members bow heads and are silent.

Auberger: "Thank you."

3/16/99

Auberger: "Please be seated. At this time, I would now like to ask Pastor George Grace, First Bible Baptist Church, to lead us in our moment of prayer. Pastor Grace will be our chaplain for the month of March. Mr. Grace?"

Grace: "Thank you Mr. Auberger. And it's good to see all of the distinguished of the Town of Greece of which I am a patron and a resident, and I want you to know that I live here, work here, shop here and do all of that, and it's good to see [*inaudible*] good friends here tonight. I want to just take a moment and thank all of you [gestures to Town Board], a year ago tomorrow night we came in with our promise, plan, project for our sports park, and it was approved as a result of the town meeting, and we're about 80 percent on the way to fulfilling phase one of that, and hopefully this year we'll be actually using that and be a help to the town, but thank you everybody for everything you've done. We want . . . I just want to give you a progress report. Join me if you would in a word of prayer. Now Lord, we come to you tonight, and we're very thankful for this town and for the people that you have given to us, the leadership in the Town of Greece. And I don't say

this lightly that I am glad to be a part of this town, and I'm glad that the people that are seated behind me are the people that you have chosen for these leadership positions. And Lord I pray that this meeting would be blessed tonight. Give us wisdom. Sometimes even Lord beyond our years and our own expertise. I pray Lord that each and every person that has brought something here this evening that needs to be considered, that each person will have due consideration, and Lord that you will would be done and accomplished in all of it. We thank you for the good reports in many ways about the Town of Greece, and I pray, Lord, that we could all join together to do our part that we would make this town better than it's ever been. Thank you for Mr. Auberger, the great leadership that he has given to us, for all that he's done for us, I pray you'd bless him and his family, and I ask this in Jesus Christ's name tonight. Amen.

4/20/99

Auberger: "We will now have a moment–please be seated–we will now have a moment of prayer lead by the Reverand Patrick Medeiros."

Medeiros: "Let's bow our heads in a word of prayer. Heavenly Father, we pause to thank you for your many provisions. You are a great God and a faithful God, and you have blessed the Town of Greece, and Father we are thankful for those who are in leadership, and as they gather together tonight to discuss the business of this community, we ask of your for wisdom, that you would lead and direct the decisions that are to be made tonight. We ask this in the name of Jesus. Amen."

TB members: "Amen"

Auberger: "Thank you Reverend Medeiros for being our chaplain of the month of April. We appreciate your service not only for coming here tonight to lead us in prayer, but also for your efforts in working with the Greece Police Department and volunteering your time to be our chaplain for the month of April. And once again we thank you on behalf of the Board and the residents of the Town of Greece. Thank you."

5/13/99

Auberger: "We have just a moment of silent prayer. Keep in your thoughts and prayers those Greece residents who have passed since our last meeting."

Auberger and TB members stand with heads bowed.

Auberger: "Please be seated."

5/18/99

Auberger: "Please be seated. We will now have our moment of prayer, lead by the Revered Ed Palumbos from St. Charles."

Palumbos: "This is a psalm for springtime, which I think we're all delighting in. O spirit of life. Not that long ago the trees around us looked like upside-down roots dangling in the wind. Today it looks like great green clouds that come to nest in their longing limbs. The spring breeze that plays in the branches is full of the song of birds recently returned. As flowers lure bees and insects by their beauty and perfume, so are we drawn out of doors to smell and sense your presence. What cathedral made by human hands could contain the awesome

majesty of your springtime wonder, O loving and creator God. And Bach or Handel would be humbled by the music of the seasons's sounds blended in harmony by your baton. And you who delight in children at play, may we never be ashamed to bow low in wonder as we offer this time together, prayer, appreciation and adoration of your sacred springtime shrine. Lord grant that these moments that we spend together might be for the building up of your creation around us and the edification of one another. We pray with confidence and with trust in your name. Amen"

Auberger: "Amen. Father if you'd stay with us?"

Auberger rises and walks over to podium.

Auberger: "Father on behalf of the Greece Town Board and the citizens of the Town of Greece and the Greece Police Department, we'd like to thank you for being our chaplain for the month of May. Thank you for being with us. Take care."

Auberger hands Palumbos a plaque.

6/15/99

Auberger: "We will now have a moment of silent prayer from Pastor Doug Morgante. Pastor?"

Morgante: "Dear Lord we are reminded in your word that unless you build the house, we labor in vain. We thank you that you have been building in this community a strong and a vibrant community. We thank you that you have poured out a blessing upon this community, and tonight we invite your presence into this room. We invite the wisdom of heaven to be released as various issues are discussed, as decisions are made. Lord I pray that there would be a sense that you are directing every deci-

sion, that you are leading the thoughts and the intents of the heart. And Lord we ask that your will would be done because we don't want any other will done but your will because that's what's going to bring in the greatest and richest release of your blessing in this community. I thank you for the men that are here and the women that are here representing our town. I thank you for the many giftings and the many abilities that you have bestowed and deposited within them. And Lord I pray tonight that a spirit of unity, a spirit of cooperation, a spirit of humility would be working in each one of their hearts, and that even the tough issues that are faced, that there would be resolution, and there would be a peace, and even a sense of accord as decisions are faced and met and conflicts are resolved. O Lord we thank you once again that you are directing our lives and directing this town. We give you all the praise and glory and honor in Jesus' name. Amen."

TB members: "Amen."

Auberger: "Thank you Pastor Morgante. If you'd stay there a second?"

Auberger rises and walks over to podium.

Auberger: "Pastor Morgante on behalf of our entire Greece Town Board and our community, we'd like to thank you for being our chaplain for the month of June and being our chaplain for the Greece Police Department. Your community involvement is well appreciated by our community. Thank you for being our chaplain.

Auberger hands Morgante a plaque.

7/20/99

Auberger: "Please be seated. At this time for a moment of prayer I'd like to ask the Deacon Richard Lombard from Holy Name of Jesus Church to step forward"

Lombard: "It says here a moment of silent prayer. I don't know how to lead a silent prayer, so we'll work our way into a spoken prayer. And let us pray. Lord we come together on this beautiful day that you have given us, brothers and sisters, to be about the business of ministering to your people in the Town of Greece. Come to us and remain with us. Give us light and strength to know your will, to make it our own. Guide us by your wisdom, support us by your power. You desire justice for all. Enable us to uphold the rights of others. Do not allow us to be mislead by ignorance or corrupted by fear or favor. As we gather here to go about this work in your name, may we temper our justice with love, so that all our decisions may be pleasing to you. And that we may do all things gently and sweetly, in the name of your Son and our brother the Lord Jesus Christ. Amen."

Several TB members: "Amen"

Auberger: "Deacon Lombard, if you'd just stay here a second."

Auberger gets up and walks to podium.

Auberger: "Deacon Dick, as far as on behalf of all of us here in the Town of Greece and everyone, I'd like to thank you for being our chaplain of the month not only here at our town board meeting, but for our entire Greece Police Department. We appreciate your efforts on behalf of our community. Thank you very much."

Auberger hands Lombard a plaque, shakes his hand. Applause.

8/17/99

Auberger: "Please be seated. At this time we'll have our moment of prayer lead by Father Frank Falletta, pastor of St. Lawrence Church. Father Falletta?"

Falletta: "Let us pray. Heavenly Father, you guide and govern everything with order and love. Look upon this assembly of our town leaders and fill them with the spirit of your wisdom. May they always act in accordance with your will and may their decisions be for the well-being of all. We ask this in your name. Amen."

Auberger: "Amen."

Auberger gets up and walks to podium.

Auberger: "Father on behalf of our Greece Town Board and our Greece community, I'd like to thank you for being our chaplain of the month not only for presiding over our Town Board meeting for August, but also being our chaplain for our police department for the month of August, and we appreciate your civic involvement. Congratulations, we appreciate it. Take care."

Auberger hands Falletta a plaque.

9/21/99

Auberger: "At this time we'd like to ask the Reverend Peg Shelton-Williamson of the Town of Greece for our moment of prayer."

Shelton-Williamson: "Let us begin with a moment of silence. [silence] Amazing God, we easily

forget that every moment of our lives are lived in your presence, so we begin by recognizing that you are present here. It is your will to hold both heaven and earth in a single piece. Let the design of your great love shine on the waste of our wraths and our sorrows, and bring peace among ourselves, in our homes and in our hearts and in our nations. Lord we have before you servants of this town who have given mightily of themselves heart, mind and souls and bodies. I ask your blessing on each one of them, that whatever it is that distracts them from knowing that they live their lives in your presence, and that they are your creation, that you would put within them that longing for eternity that brings us peace. And now, God, we know that when you speak there is light and life, when you act there is justice and love. Grant that your love might be the most dominant force in the actions of this meeting. So that what we say and what we do is done in light of your abiding presence. We ask these things in the name, the creator of the universe, Lord of our hearts and our souls, sanctifier of all of life. And I pray in the name of Jesus Christ. Amen."

Auberger: "Amen"

Auberger gets up and walks to podium.

Auberger: "Reverend Peg, on behalf of our administration, the members of the Town Board and all the citizens of the Town of Greece, I'd like to thank you for being our chaplain during the month of September not only here at our Town Board meeting, but for our Greece Police Department. On behalf of Chief [indistinct]. Thank you very much. Take care."

Auberger hands Shelton-Williamson a plaque.

10/19/99

Auberger: "We will now have our moment of prayer. I'd like to ask Reverend Patrick Medeiros."

Medeiros: "Let's pray. Heavenly Father, we thank you for this night and Father we thank you for our town supervisor and for the entire Town Board, and we thank you for their commitment to public service, and I pray especially for them tonight that you would bless them, their labors, and their families. Father, I pray tonight as they discuss the business of this community, that you would just lead and direct them. Your word tells us to ask of you for wisdom, and so we do that tonight Lord. We ask you for wisdom concerning the town's business, and Father we just ask your blessings to continue to just be provided upon this community. We thank you for its prosperity, and it's in your name we pray. Amen."

TB members: "Amen."

Auberger gets up and walks to podium.

Auberger: "Reverend Medeiros, on behalf of our Greece Town Board, our administration and the residents of the Town of Greece, I'd like to thank you for being our chaplain for the month of October. For those of you in the audience this evening, the chaplains, our monthly chaplains come from our Greece community, and they serve two functions. First of all to give the prayer and the blessing at our town board meetings, but also to assist the Greece Police Department in offering any type of spiritual counseling or consultation that might become a part of our overall investigations on an accident scene or any other types of incidences like that. We'd like to thank you for your work on behalf of the Greece community, and we'd like to offer you this plaque."

Auberger hands Medeiros a plaque.

11/16/99

Auberger: "At this time I'd like to ask the Reverend Jim Crowley to join us and to lead us in our moment of prayer. Reverend Crowley?"

Crowley: "Thank you very much supervisor. Great job boys; it was beautiful. Let's join our hearts together right now, and ask the Lord's blessing on our time together here tonight. Father, in Jesus' name we just invite you, we welcome you into this place, and we thank you because that we're honoring you first, Lord, there's going to be a difference about this meeting. Your blessing will be upon all the people involved. We pray for wisdom, God, we pray for unity in their hearts, tonight, Lord, for the decisions they have to make. We're grateful for these faithful and dedicated men and women who govern our town, who sacrifice so much for us Lord, we bless them tonight, and their families. We thank you tonight, Lord, that the decisions they render will be moral decisions and godly decisions. They'll be decisions that will be right and acceptable in your sight. We ask your blessing upon this evening, Father, and all that it pertains to, in Jesus' name. Amen."

Auberger: "Reverend Crowley, if you'd just stay there a second."

Auberger gets up and walks to podium.

Auberger: "Reverend Crowley, on behalf of the Greece Town Board, of the members who are with us this evening, and on behalf of all of the citizens of the Town of Greece, I'd like to thank you for being our chaplain for this month, not only as our chaplain for the Greece Police Department, but also for saying

our prayer at our November meeting today, and we'd like to thank you for your involvement, as always, within our community, and we have this certificate of recognition and appreciation of all the fine work that you do. Thank you once again."

Auberger hands Crowley a plaque.

12/21/99

Auberger: "At this time we now have our moment of prayer, by Reverend Stephen Patrick."

Patrick: "Let us pray. Our Heavenly Father, we pause at the beginning of this meeting tonight to give you our thanks and our praise for you are God. We thank you for the season of Christmas that is upon us and the reminder that that is of your love and your grace in our lives, and so we give you thanks. And Lord tonight we place our town leaders in your hands and ask for your blessing to be upon them. Might you grant them discernment and wisdom as they conduct the business of the meeting tonight. Might your blessing be upon this community as we together celebrate the joy of Jesus Christ in whose name we pray. Amen."

Auberger: "Reverend Patrick, if you would just remain at the podium for one second."

Auberger gets up and walks to podium.

Auberger: "Patrick, on behalf of all of us here in the Town of Greece, we'd like to thank you for being our chaplain for the month of December not only in your participation in our town board meeting, but also being the chaplain to the Greece Police Department for the month, and we really appreciate it. Thank you very much."

1/18/00

Auberger "Now for our moment of prayer I'd like to welcome the Reverend Edward Palumbos from th Town of Greece, St. Charles."

Palumbos: "Good evening. For our prayer this evening I selected a paraphrase on the psalms. Very important part of our Judeo-Christian heritage, and this is a paraphrase particularly appropriate tonight. It's called the psalm of icy awareness. The earth around my home is now locked in a winter wrap of bone-chilling ice and snow. Water once clear and liquid, a joyous flowing community is now frozen into crystals of ice. Recently in humanity's long history, there has arisen an isolation, a separation of those who share common, human flesh and bone. While once upon a time we gathered joyfully in families, tribes and clans, we now so often live divorced from earth and from each other with loneliness as our only company. All isolation is ice-olation. Frigid to human flesh, cold and lifeless to the touch, untrue to our most basic unity: community. And whenever I act singlehandedly apart from an awareness of my sisters and brothers, I become a deformed disciple, tribeless, O God. How can I tread the path which you have designed as a companion course? Ah the wisdom so divine in your Genesis words spoken to perfectly made, fully alive Adam. It is not good for one to be alone. Help us Lord in this time that we spend this night, this cold winter night, help us to learn the interrelationship we have with one another and to be strengthened in our ties to one another that we might build up our community and your kingdom. We make this prayer with confidence in your love for us. Amen."

Auberger: "Thank you father. If I may?"

Auberger gets up and walks to podium.

Auberger: "Father on behalf of our Town Board members and our administration and the citizens of the Town of Greece, I'd like to thank you once again for being our chaplain for the month of January to assist us here at our board meeting, but also as our chaplain for the Greece Police Department. Thank you once again for your efforts.

Auberger hands Palumbos a plaque.

2/15/00

Auberger: "We will now have the Reverend William Burdick from Aldersgate United Methodist Church in the Town of Greece to lead us in our moment of prayer."

Burdick: "In light of the events at Columbine, in light of the events in southwest Georgia, let us pray. In your presence, Creator and ever-creating one, we are moved to awe and gratitude, but also touched by uneasiness. All things are open before you; no secrets are hid from you. You have ordained that all of your creations should be in harmony, that we should live and work, play and reflect, govern and even pause to worship as members of a community in which respect and trust are valued, common visions shared, and core beliefs respected. There are times when the subject of the moment occasions bitterness and discord. This night we ask that you would enable us to face our future with commonality, to disagree when necessary but only with civility, and to work toward that which is fair and right and just in our planning, in our governing and in our living. Give us grace to be instruments of your love and mercy in all our affairs. Amen."

Auberger gets up and walks to podium.

Auberger: "Reverend Burdick, on behalf of all of us here in the Town of Greece, myself and our members of the administration and the members of the Town Board and all the residents of the town, I'd like to thank you for being our chaplain during the month of February and leading us in prayer here at our Town Board meeting, but also your special involvement with the Greece Police Department as the chaplain of the month. We thank you very much. Take care."

3/21/00

Auberger: "[inaudible] ask the Reverend Peg Shelton to conduct–join us for our moment of prayer."

Shelton: "Let's pray. Creator, sustainer and sanctifier, we are grateful this day for the joy of being your creatures. In a few moments there will be a time of recognition in honoring the faithful, giving and living of Officer Steve Whitehair (sp?) and student Kelly Kowalski (sp?). We ask your blessing on them and we thank you for them. Loving God, let there be a way of walking that harms not the earth, a way of having that leaves plenty for others, a path of peacemaking that settles strife, a path of justice-seeking that creates hope. Loving God, let this be–this evening be–a season of faithfulness as people created in your image doing the sometimes tedious work of keeping government responsive and responsible. Bless each councilman with clarity and wisdom, with courage and kindness, and with peace of mind. We pray in the name of our creator, in whom we live and breathe and have our being. And I pray in the name of Jesus Christ. Amen."

Auberger: Thank you Reverend Shelton for once again joining us and being our chaplain for the month of March."

4/18/00

Auberger: "At this time I'd like to welcome Pastor George Grace from First Bible Baptist Church. Before I ask Pastor Grace to come up and deliver the prayer, I'd like to acknowledge the passing away of one of our Greece residents this past month, Jack Lazarus, our former district attorney and Greece resident who left us during this month. I hope you keep him in your prayers. Pastor Grace."

Grace: "Good evening everyone. It's good to see you. Thank you for the opportunity to be here tonight to pray for the meeting. The building, the grounds just looks wonderful. It's a tribute to a lot of work, a lot of time invested by many of you, and it speaks well of our town, I think. It's nice to come into a professional building that looks so well [*sic*] and congratulations to all of you [*indisinct*]. Every time I come here, I'm impressed by it. Dear Father, we're very glad, very grateful that we can come together this evening. It's my prayer this evening that you will bless these men and these ladies. Lord I know that it is my responsibility to pray for them, but it is beyond that, it is my desire to do that. They've done much and their predecessors to give us a good town in which to live, and I pray tonight that as they come together and meet to discuss the business and the affairs of this town, Lord that you will grant them wisdom even beyond their years, Lord that you'd give them unity in the decisions that are made, then Lord the resources would be there to carry out their wishes, their desires and these decisions. Thank you for

them the time away from their families even this evening, the many sacrifices that they offer up for the town community, and I just ask now that you bless their meeting. May it be prosperous, profitable for all. In Jesus' name we ask these things, and for his sake. Amen.

Auberger: "Pastor Grace, thank you very much, and thank you for being our chaplain for the month of April. Thank you."

5/16/00

Auberger: "At this time I'd like to introduce the Reverend Patrick Medeiros who will lead us in our moment of prayer."

Medeiros: "Let's bow in a word of prayer. Heavenly Father, we come before you tonight asking you for your wisdom and your council as we conduct the business of this community. We thank you for our leaders. We pray your blessings upon them. We thank you for your many provisions and blessings upon this community and remember these young people tonight who are being honored and pray that you would just bless them Lord as they have been a blessing to this community. And we ask all this in the name of Jesus. Amen."

Auberger: "Thank you Reverend Medeiros for being our chaplain once again this month and for participating in our Town Board. We thank you very much."

6/20/00

Auberger: "At this time I'd like to introduce Father Frank Falletta, father of my parish and the pas-

tor of our Rick Antelli's parish, St. Lawrence Church, to lead us in our moment of prayer. Father?"

Falletta: "Good evening. Don't hold me responsible for those two guys. [*laughter*] I know it's probably been a very busy and a very hectic day, perhaps, for many of you. So this evening let's just for a moment, very quietly and peacefully, place ourselves in the presence of God, who dwells within us. Blessed are you Lord, God of all creation, whose goodness fills our hearts with joy. Blessed are you who have brought us together this day to work in harmony and peace. Strengthen us with your grace and wisdom, for you are God forever and ever. May the Lord bless you and keep you. May his face shine upon you and be gracious to you. May he look upon you with kindness and give you his peace. Amen."

Auberger: "Father thank you again for being our chaplain this month. We appreciate your involvement in town government. Thank you."

7/18/00

Auberger: "And now I'd like to introduce Pastor Doug Morgante from Shepherd Heart Christian Fellowship for our moment of prayer."

Morgante: "Good evening. Would you bow your heads with me as we invite the Lord's presence into this meeting? Our God I thank you, and we thank you together, that you are not only God of the heavens and the earth, but you are also God of the Town of Greece. And Lord we thank you for the wonderful things that are happening in this community. There are many things on the agenda tonight, and we thank you that you give wisdom when we ask for it. And so Lord we humble ourselves in your presence,

and we admit that there are issues that we need your wisdom, we need your insight, we need your understanding, and so we pray that you grant your favor upon all the proceedings, upon all the things that are going to be decided tonight. That there'd be unity, peace and that there'd be even the blessing of God upon all that is shared. Lord, come now and grace us with your holy presence, and oversee all the affairs of this evening. I pray a blessing upon the supervisor, upon all that who would be speaking, and we thank you for the opportunity to serve this community in your name. Amen."

Auberger: "Pastor Morgante, I'd like to thank you for coming down and once again being our chaplain for the month of July, and for also your work this month in being our chaplain for the Greece Police Department on an as-need basis. We certainly appreciate your involvement."

8/15/00

Auberger: "At this time I'd like to introduce Deacon Dick Lombard from Holy Name of Jesus Church who is our chaplain for the month of August. And it's with somewhat sadness that I have to report this evening that this will be Deacon Dick's last act in being part of our Greece community. Deacon Dick will be leaving us and going to RIT to be part of the Newman parish right out on campus, and I can say as a resident over the area for Holy Name and being on many boards and commissions in the Town of Greece, I want to say thank you, a personal thank you to Deacon Dick for the job that you have done on behalf of our community, and at this time I'd like to ask Deacon Dick to come up and lead us in prayer."

Lombard: "Let us pray. Lord we ask you to send your spirit of servanthood upon all of us gathered here this evening to do your work for the benefit of all in our community. We ask you to bless our elected and appointed officials so they may deliberate with wisdom and act with courage. Bless the members of our community who come here to speak before the board so they may state their cause with honesty and humility. And Lord this evening we ask you especially to bless Assistant Fire Marshall Robert Drexler and Lieutenant William Mackan (sp?) as they accept the positions of fire marshall and police captain. Fill their hearts Lord with zeal to serve your people, and Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day into your kingdom as good and faithful servants. We ask this in the name of our brother Jesus. Amen."

Auberger: "Amen. Thank you Deacon Dick."

9/19/00

Auberger: "Please remain standing for a moment of silent prayer. Keep in mind in your thoughts and prayers this evening those Greece residents who have passed away since our last meeting."

Auberger and TB members bow heads and are silent.

10/17/00

Auberger: "I would now like to introduce Pastor George Grace from the First Bible Baptist Church on North Greece Road who will offer our prayer."

Grace: "[*facing the board*] Thank you Mr. Auberger and before I pray, I want to extend an invita-

tion to all of you to our annual candidates' night this Sunday night. Hello Chief, how are you? And our own Gary Bikirk is going to be the speaker. Gary as you know is a Congressional Medal of Honor winner and he is a member of our church and he'll be speaking that evening. We have a good turnout of candidates. I think all ten of the judgeship candidates have agreed to be there. And then I gave Ms. Depalma one of our order forms. They're for Thread of Hope, our annual Christmas presentation. Several of you have come in the past. These have not gone public yet, but they will go public this week. Seven thousand tickets will go in the next three weeks for this. And I'd like you to have the first opportunity to accept our invitation to come, and I would encourage you if you can, if you'd like to get it back to our church immediately. We'd love to have you come and be our guests for our Christmas presentation."

Auberger: "Thank you pastor."

Grace: "Thank you for the invitation to be here, and to lead in prayer. And I'll do that right now. [*turns to face the gallery*]. Our Father, our Lord, we're very grateful for these elected officials. We're thankful for those who have been appointed. We're thankful for each person employed by our town. Lord, as a one who lives here and works here, I'm thankful to live in the Town of Greece. And I know something of the good things about this town have something to do, and maybe a great deal, with the people who are seated in this panel behind me, and I want to on behalf of our church congregation, my family, and myself, I want to thank them, and I want to pray for them tonight. We thank you for people who are willing to go above and beyond the call of duty to put themselves out in the front line for us to

serve us. We thank you for their humble and their servant spirits. I pray you'll bless this meeting tonight. Lord if there is something that we as a church and I can do as an individual, I want them to know that I'm more than willing, not knowing if I'm capable, but willing to help in any way I can. We love them, appreciate them, and hold them before you, honor them in your presence tonight, in the name of our savior Jesus Christ. Amen."

Auberger: "Amen. Thank you Pastor Grace for–"

11/21/00

Auberger: "At this time I'd like to ask Father Alexander Bradshaw, pastor of Our Mother of Sorrows Church at the request of Councilman Jim Smith to come forward and he will offer our prayer."

Bradshaw: "I just invite you to pause in quiet and meditation and reflection in prayer before the beginning of this evening's business, as we entrust everything that happens tonight to the good Lord who protects us. Lord God of all creation: in this season of thanksgiving we give you thanks and praise for all the blessings we enjoy as citizens of this great country of ours, for our freedom, for our laws, for our democracy and prosperity. We acknowledge out of your provident care for us, you are the source of all that we have and all that we are. As we recall the first Thanksgiving celebration of the Pilgrim fathers and mothers 380 years ago, and how they gave praise to you for having blessed them with a good harvest after many trials and tribulations, we too proclaim our gratitude to you, O Lord, for your goodness to us in this millennium year 2000. As the Greece Town Board meets this evening, we pray that everything that they do may begin with your inspira-

tion and continue with your help. So that all their work may begin with you and by you be happily ended for the benefit of all the citizens whom they represent. Bless this Town of Greece and all who live here. Praise and glory be yours, O Lord, now and forever. Amen."

Auberger: "Amen. Thank you Father. If you'd remain there a second?"

Auberger gets up and walks to podium.

Auberger: "[*inaudible comment*] On behalf of all of us here in the Town of Greece, our administration and the citizens, we'd like to thank you for being our chaplain for the month of November [*inaudible*] Greece Police Department in your role of chaplain for this month. We appreciate your [*inaudible*]. Thank you Father, very much."

12/19/2000

Auberger: Please be seated. Pastor Patrick Medeiros from the Greece Assembly of God Church will offer our prayer.

Pastor Medeiros: Good evening. Let us pray. Heavenly Father we have much to thank you for as this year is coming closely to an end. We thank you for your many provisions throughout this year. Lord during this holiday season we pause to think of those in our community who have been hit by tragedy this past year, hardship. Father we especially pray for those tonight that you would comfort them, you would strengthen them, that you would fill them with your peace and that you would provide and meet their every need. And Father we thank you for the leaders in our community and Father we pray that would you bless them especially during this hol-

iday season. And Father as they conduct the business at hand tonight we look to you for your wisdom, your guidance, and your direction. And bless this meeting tonight and bless our community as we enter the near year. It's in Jesus' name we pray, Amen.

Auberger: Amen. Pastor Medeiros again I'd like to thank you for being our chaplain for the month of December in addition to doing our prayer. Thank you for being supportive for the Greece police department and for also as serving a role as their chaplain for the month. We appreciate it. Thank you.

1/16/01

Auberger: We now ask Father Michael Valino from my parish and from Councilman Rick Antelli's parish from Saint Lawrence Church in the town of Greece to offer our prayer.

Father Valino: Let us pray. Lord Our G-d look with love upon the people of this community and keep them safe in your service. Guide the members of this board and help them to work together for the good of all. Bless their plans and deliberations and bring them to success. Guide all the members of this meeting and help them all to serve the people of Greece. Bring success to their work and reward them for the good they do. We ask this through Christ, Our Lord. Amen.

Auberger: Thank you Father if you could just bear with us for a second. (Walks to the podium) Father on behalf of all the citizens in the town of Greece we'd like to thank you for being our chaplain for the month of January for presiding in our town board meeting with the prayer and also in apprecia-

tion with the Greece police department for being their chaplain for the month of January. We thank you. (Hands the plaque to Father Valino)

2/20/01

Auberger: Right now I'd like to ask the Reverend Bill Burdick from United Methodist Church to offer our prayer.

Rev. Burdick: Supervisor and members of the Town Board and all the supportive services, I ask for a moment of special privilege before prayer.

Auberger: Granted Reverend Burdick.

Rev. Burdick: Six years and eight months ago my wife Sue and I first came to Greece to live among you in a parsonage on Summer Hill Drive. In July of this year we intend to retire and we have selected Greece as our place of residence for retirement. We do that thanking you for the service and for the community that has been established here. Now may we pray. Creator and ever-creating G-d, you have given us the image of a kingdom of Heaven or a kingdom of Your Realm as the ideal to which our human settlement should strive. We pause this evening before the business that is to come before this governing body, in order to refocus our thoughts and cast our visions on the highest ideal. There have been those over the years that have equated building the American experience to forming such a realm. It is a noble calling. However, you have also given us the image of family as the ideal community we should seek. And we know in any family there are differences in personality, conflicts in different styles. There are varying generations with different concerns. There are some families and some indi-

viduals within families who function more effectively than do others. So tonight we ask that you help us see what the needs are if it is to be for all of the people and help us to know what is future directed and not merely a lock on the past. Help us to work on behalf of the greater community of which we are a part, and help us also to know all those who have given their lives that our quality of life might be better. So we pause now, seeking clarity on the issues and direction for tomorrow. We ask your guidance and your presence that we may form a more perfect community, promoting the common good, and working for peace and justice for all. Now in the moment of silence may we each lift up our deepest concerns and strongest longings. Hear these and all our prayers, oh Lord, and let everyone say, Amen. (Moment of Silence)

Auberger: (gets up during the moment of silence and goes to podium) Reverend Burdick on behalf of all the residents and the town of Greece, our administration and staff, I would like to thank you for being our chaplain for the month of February and also chaplain to the Greece police department for the month of February and we're very honored and privileged not only that you could be our chaplain this month but also that you affirmed that you wanted to stay and enjoy your retirement within the town of Greece. We have a special plaque for you in acknowledgement of your work for us this month which we will be mailing to your house. So once again I would like to say thank you very much for a job well done.

Rev. Burdick: Thank you supervisor. We also have a pin which designates Aldersgate as one of your faith communities and you'll note in the small

type in the bottom that Greece, New York is highlighted.

3/20/01

Auberger: Pastor Doug Morgante will now offer our prayer.

Pastor Morgante: Good evening would you join with me as we ask the Lord's presence here to preside over this meeting. Heavenly Father we thank you that you are a G-d that's involved in our lives, personally and also in our lives in a community sense. We thank you that you have blessed Greece. We thank you that you have blessed our town leaders with wisdom, with insight; they might do the job given to them to the best of their ability. We thank you that you are leading and directing and guiding in ways that we can't see or imagine. We pray tonight Lord as the agenda is worked through that there would be a sense of Your Hand directing and leading all the affairs that are on the table tonight. Let your wisdom be released. I pray that there will be good discussion, healthy debate, but everything would bring glory, honor, and praise to Your Name. So we ask your blessing on all that is done tonight. Amen.

Auberger: Pastor Doug I would like to thank you once again on behalf of our town board, administration, and residents of the town of Greece. Thank you for being our chaplain for month of March, for also assisting the Greece police department as their chaplain for this month. We commend you once again for your efforts on behalf of our entire community, we offer you much thanks.

4/17/01

Auberger: I'd like to ask the Reverend John Forni from St. John the Evangelist Church to offer our prayer.

Rev. Forni: Let us pray. Tonight we stand before you, Lord G-d Our Creator, conscious of our limitations, for the where that we gather in Your Sight. Come to us, remain with us, and enlighten our hearts. Give us light and strength to know Your Will, to make it our own and to live it in our lives. Guide us by your wisdom, support us by your power, for you are Our Creator. You desire justice for all. Enable us to uphold the rights of others. To not allow us to be mislead by ignorance or corrupted by fear or favor. Unite us to yourself in the bond of love and keep us faithful to all that is true. As we gather in this meeting, may we temper justice with love so that all our decisions may be pleasing to You and earned the reward promised to the good and faithful servants. Lord Our G-d look with love on the people of this community and keep them safe in your service. Guide the members of this board and help them to work together for the good of all. Bless their plans and deliberations and bring them to success. Blessed are You, Lord Our G-d, forever and ever. Amen."

Auberger: Reverend if you would remain there for one minute please. (Auberger walks off camera then comes back with plaque in hand) Father on the behalf of the town of Greece, our administration, and Greece police department we would like to thank you for being our chaplain for the month of April and also thank you for your services to the Greece police department as their chaplain for this month. We really

do appreciate it. And again on the behalf of all of our citizens, I thank you. Thank you very much.

5/15/01

Auberger: At this time I would like to ask Pastor George Grace from First Bible Baptist Church to lead us in prayer.

Pastor Grace: Thank you Mr. Supervisor. Before I pray I'd like to make a motion that we never have a town business meeting on a beautiful night like this. I knew I'd get some cooperation on that- I don't get much at home. But anyways it's good to see you this evening. I'd like to begin with a word of prayer and I want to thank each of you for the opportunity to be here- just to be part of this. We are indeed grateful for your many blessings in our lives and right now, Father, I want to pray for the people, particularly seated behind me, and political figures that are seated before me, Lord that you would give them good health. Lord that you would give them family time that could make up for the lost time this evening serving their community. Lord that you would give them wisdom as they make decisions here this evening that in many ways may ultimately affect all of us. We do thank you Lord for the good town, the safe community that we live in, and for each and every person here and outside this building that serves in such a way that secures that safety and I pray that you would bless this meeting in a great way and give us fruit for the time that's been invested in planning and preparation for the good and wise and helpful decisions will be made here this evening. Thank you Lord for the people who will be here to be honored for great civic activities, for responsibilities that have been fulfilled, for action that has been taken that is

worthy for public recognition. Thank you for people like that to live with in this great town of Greece. We pray this in Our Lord and Savior Jesus' name. Amen. Amen.

Auberger: Thank you Pastor Grace. Thank you once against for being our chaplain of the month and also our chaplain for the police department of Greece.

7/17/01

Auberger: I'll have the Reverend Anne O'Connor from the United Methodist Church will offer our prayer.

Rev. O'Connor: Let us pray. Almighty G-d we seek your blessing upon this meeting of the Greece Town Board. We ask that you would patience, wisdom, and sensitivity to the members and other leaders of the town that the decision they make will be according to Your Will, and to the benefit of the community. Enable all members to work together to solve the issues we face. Amen.

Auberger: Thank you Reverend O'Connor for being our chaplain for the month of July and also for being our chaplain for the Greece Police Department for the month of July. We really appreciate that. Thank you. (Laughter)

8/21/01

Auberger: Father Bradshaw from Mother of Sorrows Church will offer our prayer.

Father Bradshaw: It's always an honor to be here and I thank you very much. I would also just like to express my gratitude for all the help I've been receiving from so many of these distinguished people

sitting behind me in many different respects. I really, really appreciate it. Thank you. So let us all pray. Lord G-d of all Creation, in these remaining days of summer we give you thanks and praise for all the blessings that we enjoy as citizens of this great country of ours for our freedom, for our laws, for our democracy, and our prosperity. We thank you too for this beautiful months that we have spent, for the sunshine, the blue skies, the warm weather, the vacations that we've enjoyed. We affirm that out of your providential care for us, you are the source of all that we have and are. Furthermore, we acknowledge the role of the Holy Spirit in our lives and that while there is a variety of gifts, there is always the one and the same spirit working in different ways in different people. The particular way the Spirit is given to each person is for a good purpose. We pray this evening for the guidance of the Holy Spirit as the Greece Town Board meets. May the members of the Board devote their attention this evening in appreciate of each other's gifts and with the benefit and well-being of all the citizens they represent always in the forefront of their minds. Bless this town of Greece and all who live here. Praise and glory be Yours oh Lord. Now and forever. Amen. Let's just say the Our Father together. Our Father who art in Heaven, hallowed by thy name, thy kingdom come, thy will be done, on Earth as it is in Heaven, give us this day, our daily bread, forgive us our trespasses, as we forgive those who trespass against us, and lead us not into temptation, but deliver us from evil for thine is the kingdom, and the power, and the glory forever and ever. Amen.

Auberger: Thank you Father and on behalf of the citizens of the town of Greece, thank you for being our chaplain for this month and also our chaplain

for the Greece police department. We thank you very much.

9/18/01

Auberger: At this time I would like to ask you to bow your heads in prayer, not only for members of our Greece community, for members who reside in the state of New York, for the senseless tragedy that occurred one week ago today. Let us never forget the brave men and women who gave their lives for such a horrible, senseless tragedy that occurred in the twin towers in New York and the pentagon in Washington D.C. and in a remote area in the state of Pennsylvania. September 11th, 2001- keep in your thoughts and in your prayers, forever. (Moment of silence) At this time I would like to introduce to you Michelle Bertot, Associate Pastor of Holy Name of Jesus Church in the town of Greece.

Associate Pastor Bertot: Let us pray. Lord Our G-d, look with love on the people of this community in Greece and keep them safe in your service. Guide the members of this council and help them to work together for the good of all. Bless their plans and deliberations and bring them to success. Blessed are you, Lord Our G-d, forever and ever. Amen.

10/16/01

Auberger: We'll now have Pastor Doug Morgante from the Shepherds Hearts Christian Church for a moment of prayer.

Pastor Morgante: Heavenly Father, we are here tonight to take care of the affairs of the town of Greece. We thank you for this fine town. We thank you for the great leaders that you have given us. We thank you for their commitment, their willingness to

sacrifice. Thank you for the way they have demonstrated faithfulness day after day, week after week. We thank you Lord for our town board, our supervisor, and all of the attending staff, all the employees of our town. We pray in blessing, especially as we walk through a very intense and difficult time in our nation's history. We pray that you will give them strength and courage and wisdom and you would anoint them for leadership like never before. That they will lead our town to the full purposes that you have for this town. We pray tonight that there will be wisdom granted, insight and understanding given as the different aspects of the agenda are discussed and we pray that your plan and your purpose for this town will prevail. Amen.

Auberger: Thank you Pastor Doug.

11/20/01

Auberger: Pastor Duker from Hope Lutheran Church will offer our prayer.

Pastor Duker: Pause to pray. Gracious Heavenly Father, in these most significant, unique, and trying times we come to you in prayer asking for divine protection for the people of this nation. We pray for the safety of every man, woman, and child. Keep us from harms way and provide protection from plans of destruction that our enemies may have plotted. We ask you to give wisdom, understanding, and discernment for those who provide protection. Help us to be watchful and alert. Provide insight to national and local authorities. This evening lift up the town supervisor, the town board, and others in responsible positions in this community. We pray Father that they will be open to the awareness of their responsibility of their challenge and opportunity. Help them

to place a higher value on service and efficiency than on experience when they place a higher estate on character than upon reputation. Help them to seek harmony with the will of G-d the laws of man and the purpose for which G-d has made them. Help them to view everything against the background of eternity instead of the horizon of time. And help them, we pray Father that they refuse to make compromise in rather to seek the guidance and direction of their understanding of their abilities to choose that which is best for community and people. I commend this board to you, the decisions made this evening, all in the name of Your Son, Jesus Christ. Amen.

Auberger: Thank you Pastor Duker for being our chaplain for the month of November. We really do appreciate your service.

12/18/01

Auberger: (the beginning is cut off) Baptist Church will offer our prayer. Pastor Grace.

Pastor Grace: Thank you supervisor Auberger and on behalf of the Grace and Truth Sports Park in North Star Christian Academy of First Bible Baptist Church I want to wish all of you a merry Christmas and a wonderful new year and I hope it will be a better one than this past one we've had some difficulties as we all know. I want to commend also our supervisor for several activities that he has encouraged us and planned throughout the year that has emphasized spiritual values in our community and as a Pastor of several hundred and even thousand people, it has been a blessing to us and an encouragement to us as Christian people to have a supervisor like you Mr. Auberger whose emphasized those things. I just

want that to go on public record. If you would join me in a word of prayer. Father, we're very grateful for the privilege to come together tonight. Right now I want to beseech you on behalf of the leaders of our country, the military, all those who will be away from home these next few days who won't enjoy the luxuries and conveniences and family members that most of us will. We pray that you will be with them, guide them. Guide them and protect them. Then Lord we think of these men and ladies that are seated behind me, I pray for each and every one of them and their families that they have a wonderful Christmas time and a happy new year. And give them wisdom to perform the duties and responsibilities that you've given to them. Although we pray that the coming year will be a better one than last, Lord that it will be the best maybe that we've all been able to enjoy in our lifetimes. Bless this meeting tonight as we come together and we pray this tonight in the Lord Jesus' name for his sake, amen. Amen. And thank you everyone.

Auberger: And thank you Pastor Grace. And thank you once again for being our chaplain and all that you do here in our community.

1/15/02

Auberger: "We will now have the moment of prayer be lead by the Reverend Patrick Medeiros from the Greece Assembly of God Church."

Medeiros: "Good evening. Heavenly Father, we thank you for this meeting in this new year. We thank you for our town leaders. We ask your blessings upon tonight's meeting and upon our community throughout the year 2002, and we ask it in Christ's name. Amen."

Aubeger: "Amen. Thank you Pastor Pat for being our chaplain for the month, and also our chaplain for the Greece Police Department. We certainly appreciate it."

2/19/02

Auberger: "We now have our moment of prayer lead by Father Alex Bradshaw from Our Mother of Sorrows Church. Father Bradshaw."

Bradshaw: "So we're gathered together in prayer at the beginning of this evening's business. Lord God of all creation, we give you thanks and praise for your presence and your action in the world. In the midst of all the sorrow and pain that we've experienced since the tragedy of September 11th. We have witnessed many deeds of courage, generosity of spirit and compassion from many good and selfless people. Such acts of sacrifice and service have deepened our faith and trust in your love for us and restored our hope and confidence in the future. We have found that our of your providential care for us, you are the source of all that we have and are. We acknowledge the role of the Holy Spirit in our lives, that while there are a variety of gifts, there is always the one and the same spirit working in different ways and different people. The particular way in which the Spirit has given to each person is for a good purpose. We pray this evening for the guidance of the Holy Spirit as the Greece Town Board meets. May the members of the board devote their attention to the agenda this evening with an appreciation of each other's gifts and with the benefit and well-being of all the citizens whom they represent always in the forefront of their minds. Bless this Town of Greece and all who live here. Praise and glory be yours Lord,

now and forever. Amen. May the Lord bless you and keep you. May the Lord shine his face upon you and be gracious to you. May the Lord look kindly upon you and may he give you his peace. We pray this in the name of the Father, the Son and of the Holy Spirit. Amen."

Bradshaw, Councilman Bob Bilsky and Auberger all make the sign of the cross.

Auberger: "Thank you Father. Thank you once again for being our chaplain. Thank you very much."

3/19/02

Auberger: "We now have the Reverend Anne O'Connor from the Aldersgate United Methodist Church will offer our prayer."

O'Connor: "Let us pray. Gracious and almighty God, we thank you for your presence with us this evening. We thank you for this great community and nation in which we live. And we thank you for all those who serve in our community and nation and ask that you watch over them. We remember before you those in our community who are in need, the sick, the unemployed, and the troubled. We also seek your blessing on this meeting tonight. Grant your compassion and wisdom to all who participate in its proceedings and decisionmaking, in Jesus' name. Amen."

Auberger: "Amen. Thank you Reverend O'Connor for being our chaplain for the month of March and also for being our chaplain for the Greece Police Department. We truly appreciate your contribution to your community. As always we thank you very much for being with us today."

4/16/02

Auberger: "We now ask the Pastor Doug Morgante of Shepherd's Heart Christian Church will offer our prayer."

Morgante: "Good evening. I've had a couple of requests to pray for a short meeting tonight, so everybody can go out and enjoy the beautiful day the Lord's given us. Just kidding. We wouldn't be where we were if it wasn't for God's blessing upon our great town and for his blessing upon the leaders he's given us, so would you join with me as we ask his favor upon our community. Lord we thank you that you have given us servants who love our community. Supervisor, town board officials, police and fire departments, many who sacrifice and serve, and we pray your blessing upon them. We recognize that every good thing and every perfect gift comes down from you. And Lord we don't want to take credit ourselves for the blessing and the prosperity of the Town of Greece and lest we forget the fountain from where all blessings flow. We say thank you tonight. And lest we become proudful and think it's because of us, we're reminded that you are the sovereign God who rules over all of your creation. And so we ask for your blessing upon this meeting tonight, that all the affairs on the agenda would be sorted out and worked through, there'd be peace and harmony and unity. And that our town would move forward accomplishing the mission and the vision that you've put in our supervisor's heart. We thank you for this evening. Thank you for this opportunity in Jesus' name. Amen."

Auberger: "Amen. Thank you Pastor Doug for being our chaplain for this month and also the chaplain for the Greece Police Department this month."

5/20/02

Auberger: "We will now have Michele Bertot, Pastoral Associate of Holy Name of Jesus Church will offer our prayer."

Bertot: "Let us pause to ask God for help. God in heaven, bless us as we gather today for this town board meeting. Guard our minds and our hearts so that we will work for the good of our community and help all your people. Teach us to be generous in our outlook, courageous in the face of difficult and wise in our decisions. Lord we praise you, for you are God, forever and ever. Amen."

Auberger: "Amen. Thank you Michele for being our chaplain for the month of May."

6/18/02

Auberger: "We now have Pastor George Grace from First Bible Baptist Church who is our chaplain for this month to lead–offer a prayer."

Grace: "Thank you Supervisor Auberger. And before I pray, I want to issue a personal invitation to each and every one of you, and to you here in the audience, to our Spirit of America Celebration on Fourth of July down at the Grace and Truth Sports Park. Several of the people here on this panel in front of me have helped us already in a tremendous way to pull this off and plan it. Thank you to each and every one of you. 7:00 that night we'll be having a concert by the Kings Brass, 9:30 or whenever that gets dark, in Rochester that could be 6:00 at night, whenever it gets dark we're going to have a great fireworks display there and we want to invite every single one of you along with our own hometown hero Gary Bikerk will be doing a pledge to our flag, our

specific skit, I suppose is the best word I could use, in honor of our flag that evening, but we want to invite you all."

Auberger: "Thank you Reverend Grace."

Grace: "And if you would join me in a word of prayer. Now Lord, I am honored to be in the presence of these people. Lord I pray for them often. You've given them great responsibility in so many areas. Lord I thank you for having the privilege of living, working in this town. And the safety, the security, the order, all of the good benefits and advantages of being a resident of the Town of Greece. And I want to pray for these people. I know that their jobs are not always appreciated. Lord I know there's probably not a lot of people who pray for them on a regular basis, but Lord, I encourage our church people, and I want to pray for them right now. Lord that you give them a good meeting tonight as they tend to the business of this community. Lord I pray for their health, I pray for wisdom for each of them, and Lord I pray for their families. I know Lord that oftentimes their families go without them to fulfill their civic responsibilities. I pray for wives, husbands, children, other family members, Lord, that need them ,love them, care for them, in their absence. And bless this meeting again tonight. We pray each life that's represented in this room in the Lord Jesus' name I ask it. Amen.

Auberger: "Amen."

Grace turns to face board

Grace: "[*inaudible*] us all. We do pray for you. Thank you so much."

Auberger: "Thank you Pastor Grace. Thank you very much."

7/16/02

Auberger: "At this time we'll have the Reverend Anne O'Connor from the Aldersgate United Methodist Church will offer our prayer."

O'Connor: "Let us pray. Wonderful God, we thank you for your presence with us this evening. We thank you for all who use their gifts and talents in service to our community. Safely keep those who risk their lives each day in the line of duty. We pray for Supervisor Auberger, for the town board members, and for the other leaders of this community, that you will guide their deliberations and decisions. We also seek your support and guidance for all who will participate tonight. We remember before you those in our community who are in need, those who grieve, those who are sick, those who despair for whatever reason. Show us how we can help and give us strength to serve. In Jesus' name: Amen."

Auberger: "Amen. Thank you Reverend O'Connor for once again being our chaplain for the month of July, and also our chaplain for the Greece Police Department for this month. We appreciate your community involvement. Thank you."

8/20/02

Auberger: "Please remain standing. We'd also at this time like to ask Councilman Helfer to lead us in prayer."

Helfer: "Please bow your heads and join me in prayer. Heavenly Father we thank you for this day. We thank you for the opportunity to now join together here to conduct the important public business that is before us. We ask that you would guide the decision making and the discussions that take place this

evening, and that you would bless each of the participants in the town board as well as all of those who are here in the audience and may be viewing on television. We pray this in your name, amen."

Auberger: "Please remain standing. We also have Father Micky McGrath from St. Charles Borromeo Parish. Father, thank you. Father–father? This one's on right here for you."

McGrath: Brothers and sisters, as we set out we should remind ourselves of the reason for our resolve to go and gather in this place of service to our brothers and sisters in our community. We ask the Lord's blessings on all of these endeavors in which we partake. The love of the Lord has gathered us together into one. Let us rejoice and be glad in him. Let us fear and love the living God, and let us love each other from the depths of our hearts. Therefore, as we gather together, let us not take heed or be divided in mind. Let there be an end to bitterness and quarrels and an end to all strife, and in our midst may be the living and continuing dwelling of God in our hearts. In the company with the blessed Lord, may we see the face of Almighty God in all those we seek to serve and reach out with all of our gifts and talents which God has so bountifully endeavored upon us. We ask this for the blessings of Almighty God upon this gathering, amen."

McGrath: "Father we thank you very much for being our chaplain for this month. Thank you."

9/17/02

Auberger: "We will now have Pastor Doug Morgante from Shepherd's Heart Christian Church will offer our prayer."

Morgante: "Good evening. [*indistinct*] bow your heads with me? Father we are humbled today in your presence at the many blessings and ways in which you have shown yourself to be faithful in our lives. And even in this great town in which you have placed us, we thank you for the prosperity that you have given us. We thank you for the peace within our borders. We thank you for the great men and the great women that have given of their time to serve to make this a better community, a great place in which to live. But Lord, we recognize that we need you, we need your wisdom, your truth, your understanding. We need your plan and your purpose to unfold, and as business is discussed tonight, as decisions are made, I pray it would be with the wisdom of God, that you would lead and direct the course of affairs tonight, and that much would be accomplished, that your will would be done, and that your kingdom would be established in this community on earth as it is in heaven. We pray these things in your name, Amen."

Auberger: "We thank you Pastor Doug for once again being our chaplain for the month of September. We appreciate your community involvement."

10/15/02

Auberger: "We will now have the Reverend Patrick Medeiros of the Greece Assembly of God Church who will offer our prayer."

Medeiros: "Heavenly Father we thank you for your many blessings, your goodness to us in the Town of Greece. We thank you for our town officials. We commit this meeting to you tonight, and we pray that you would grant them each the wisdom as they make the decisions that would be best for this com-

munity. We ask it all in the name of Jesus Christ, our savior, amen."

Auberger: "Amen. Thank you pastor."

12/17/02

Auberger: "We will now have the Reverend Doug Morgante from Shepherd Heart Christian Church will offer our prayer."

Morgante: "Good evening. Would you bow your heads with me as we invite the Lord's presence here tonight? Gracious Lord, we thank you so much for this opportunity to come together, to plan, to build, to establish direction for this fine community. And Lord, we acknowledge tonight that without your help, without your grace, without your wisdom, we'd probably make a mess of things. But I thank you for the men you've put in each and every position, key positions of leadership. I thank you for their humble hearts. I thank you for their willingness to serve. I thank you that they are the vessels through which you are going to establish your purpose for this community so we ask, Father, for your blessing upon all the affairs of this evening. Direct, guide, lead and establish your will. I pray for the supervisor that you would give him great wisdom, and you would give him leadership skill and ability beyond what he's ever experienced to lead this town to a new place, to a new place of unity, to a new place of strength, to a new place of influence. And we thank you for your blessing in Jesus' name, amen."

Auberger: "Amen. Thank you pastor."

1/21/03

Auberger: "Reverend Patrick Medeiros of the Greece Assembly of God Church will now offer our prayer."

Medieros: "Good evening. Let's pray. Heavenly father we thank you for our town leaders, and we pray for tonight's meeting that you would grant them wisdom as they conduct the business of our great community. And it's in Christ's name we pray, amen."

Auberger: "Amen. Thank you Reverend for once again being our pastor for the Greece Police Department and also being with us today for the month of January. Once again we appreciate your efforts."

2/18/03

Auberger: "We will now have the Reverend Anne O'Connor of the Aldersgate United Methodist Church will now offer our prayer."

O'Connor: "Let us pray. Almighty God, in this time of uncertainty in our world, we look to your for help and guidance. Give wisdom to the leaders throughout the world, in our country and here in our community. Direct them to make decisions according to your will so that people everywhere can live in freedom, justice and peace. We thank you for our community here in Greece. Watch over all who live and work and serve in our community. Keep safe those who are away from home serving in a [*sic*] military. O God we thank you for your constant presence. Guide and bless this meeting tonight and those who speak, listen and make decisions. Amen

Auberger: "Thank you Reverend O'Connor for once again being our chaplain for the month of Feb-

ruary and for also being our chaplain for the Greece Police Department for this month. We appreciate your involvement."

3/18/03

Auberger: "We now have Father Alex Bradshaw from Our Mother Sorrows Church will offer our prayer. Father Bradshaw."

Bradshaw: "Let us pray. Lord God of all creation, we give you thanks and praise for your presence and action in the world. We are living in difficult and troubled times. War with Iraq is an immanent prospect. We pray for a swift resolution of the conflict. We pray for the protection of our armed forces, and for the safe and sound return of our men and women serving overseas back to their anxious families. We pray too for the people of Iraq, for an end to the tyranny, the oppression and suffering that they have long endured under the yoke of Saddam Hussain, and for a future of peace and prosperity to be enjoyed by the unfortunate citizens of that county. Furthermore, we pray for international cooperation between the nations of the world. May a speedy end to the conflict in Iraq be the new beginning of nations working together for peace in the Middle East and of harmony between people of different religions, languages and ways of life. We acknowledge the role of the Holy Spirit in our lives, that while there is a variety of gifts, there is always one and the same spirit working in different ways in different people. The particular way in which the spirit is given to each person is for a good purpose. We pray this evening for the guidance of the Holy Spirit as the Greece Town Board meets. May the members of the board devote their attention to the agenda of this

evening with an appreciation of each other's gifts, and with the benefit and well-being of all the citizens whom they represent always in the forefront of their minds. Bless this Town of Greece and all who live here. Praise and glory be yours O Lord, now and forevermore. Amen."

Auberger: "Thank you Father for once again being here for our prayer and for being our chaplain for the Greece Police Department for the month of March. We appreciate your community involvement. Thank you Father."

4/15/03

Auberger: "We will now have our moment of prayer. I'd like to ask the Reverend Vince DiPaolo from Lakeshore Community Church."

DiPaolo: "Well good evening board members and everybody. Let's bow our heads out of respect to God and invoke his blessings on this meeting. Lord we thank you so much for the privilege of having organized government and we thank you so much for these fine men and women who you described as servants. We thank you that they serve us, and we just pray that tonight's meeting would be a meeting in which your will is accomplished. We just pray that wise decisions would be made, that there would be a synergy and collaboration between members of the board and assistants, people participating in the meeting tonight. And I just pray that everything would be done to please you. I pray that our community would continue to be a strong community, would continue to be a community that is blessed by you. And we just pray, right now, and invoke your blessings on this meeting. May everything be carried out to honor you, and again may these men and

women be instilled with wisdom from you. And we ask this thinking about Good Friday and Easter coming ahead. We thank you for that Good News as well, but we ask this through Jesus Christ, amen."

Auberger: "Amen. Thank you Reverend DiPaolo for once again being our chaplain for the month of April."

6/17/03

Auberger: "We now ask the Reverend Pat Medeiros of the Greece Assembly of God Church will offer our prayer."

Medeiros: "Let's pray. Heavenly Father, we thank you for this day and we thank you for this community and how you've blessed it. We thank you for the leadership and we ask that you'd grant them wisdom as they conduct the business of our community. And it's in Christ's name we pray, amen."

Auberger: "Pastor Pat, I'd like to say thank you on behalf of the board and the members of our administration and the citizens of the Town of Greece. Thank you for being our chaplain for the month of June. We appreciate as always your kind service to this community. Thank you very much."

7/15/03

Auberger: "We will now have Pastor Doug Morgante from Shepherd's Heart Church will offer our prayer."

Morgante: "Good evening. Would you join with me as we invite the Lord's presence to be here tonight? Our Father we thank you so much for the way you have blessed this great town. You have given us wonderful leaders who are wise and good stew-

ards of what you have put into their hand. And Lord, we call upon your name tonight. We ask you to grant wisdom and understanding. We ask you to give discernment and insight into all the affairs, all the issues that are on the agenda tonight. Lord, we ask your blessing upon this meeting and as the town goes forward, set the course, not just for the next month, but for the next year, or two or five or ten, as great matters are weight, and as even simple decisions are made. Without you Lord, it's all in vain, and so we invoke your presence tonight, and I pray your hand would rest upon every person here. In the name of your son, amen."

Auberger: "Amen. Pastor Doug, we thank you once again for being our chaplain for the month of July and also our chaplain for the Greece Police Department during this month. We appreciate your continued support. Thank you very much."

8/19/03

Auberger: "We now have Pastor Pat Medeiros from the Greece Assembly of God will offer our prayer."

Medeiros: "Heavenly Father, we thank you for your blessings upon our community, and we thank you for our community leaders, and we just commit this night of business to you. We pray that you would grant them your wisdom, and it's in Christ's name we pray. Amen."

Auberger: "Amen. Thank you Pastor Pat for once again being our chaplain for the month of August and for our chaplain for the Greece Police Department. Thank you very much."

9/16/03

Auberger: "We will now have the Reverend Larry Wade from First Bible Baptist Church will offer our prayer for this evening."

Wade: "Let's pray together. Heavenly Father, what a beautiful day you've blessed us with, and we thank you for it, and we thank you for this great town that we live in, county, our country. Lord we ask your blessings upon those that are defending our country overseas, wherever they might be. Once again we lift them up to you in prayer and ask for your continued guidance and direction. We thank you for our president and ask for your direction in his life and the decisions that he and the leaders of our country make. And Father, I would pray for this town meeting tonight. Thank you for all of these who represent the town and work for the town. Lord as we continue to pray for them on a daily and monthly basis, tonight I pray that you would guide every decision that they're going to make. I thank you for them. Protect their health, bless their families and the endeavors that they're a part of, in Jesus' name, amen.

Auberger: "Amen. Thank you Reverend Wade for being our chaplain for the month of September. We appreciate your efforts. Thank you once again.

10/21/03

Auberger: We now ask the Reverend Patrick Meideros from the Greece Assembly of G-d Church to offer our prayer.

Rev. Meideros: Heavenly Father we come before you tonight with thanksgiving in our hearts and many blessings upon our community. I thank you

too for our community leaders and as they discuss town business tonight I pray that you would grant them wisdom and bless this time of meeting. We ask it in Christ's name. Amen.

Auberger: Thank you Reverend Pat for once again being our chaplain for the month and we appreciate your involvement with our Greece police department with your involvement with our community. Thank you once again.

11/18/2003

Auberger: Please be seated. We now have the Revered Al Haug from the Shepherd's Hearts Church will offer our prayer.

Reverend Haug: Heavenly Father we thank you that you have blessed us with your presence in our nation, in our state, and in our town. Lord we thank you that you have given us these men and women to vessels of your service to lead us. And we ask them this night Lord that you will give them wisdom and discernment into every matter that comes before them. That they will know it in relation to your divine plan for this town. And Father that your glory will be made manifest in all that is said and done. Father we ask that you would be the very glory that is dwelling within our midst. Father that in this town you would be exalted in the decisions that are made, in the business that is conducted. Father that you would be glorified as people come together to serve you. Father I ask your blessing upon our town board as they conduct the business of this town. In Jesus' name, Amen.

Auberger: Amen. Thank you Revered Haug for being our chaplain for the Greece police department this month and for offering our prayer.

1/20/04

Auberger: "We will now have Pastor Doug Morgante from Shepherd's Heart Church will lead us in a moment of prayer."

Morgante: "Would you bow your heads with me please? Heavenly Father we thank you that you are not a God who simply dwells in the heavens and looks down on the affairs of men from a distance, but you are intimately involved in every detail of our lives. You are intimately involved in every community, and we thank you that you are involved in the community of Greece, that you are leading our supervisor, our town board, and various department heads, that your hand is upon them because they are men of faith. They are men who are servants, who have laid their lives down to see this community progress and to see this community fulfill its destiny. And so I pray that your blessing would rest upon all of the affairs of this evening, that you would lead our supervisor, that decisions made would fit your purposes, and that this town would continue to function under your wisdom, your grace and your blessing. So we thank you for all the wonderful, wonderful things you're doing. We thank you for the tremendous record, the tremendous influence and the tremendous town that you have given to us. And we recognize and acknowledge that without you it would be impossible to achieve all that we've done, so we thank you, and from a grateful heart, Lord, we commit this meeting to you. Amen."

Auberger: "Amen. Thank you Pastor Doug for once again being our chaplain for the month of January, and also for the Greece Police Department. We thank you very much. Thank you."

2/24/04

Auberger: "We now have the Reverend Anne O'Connor from the Aldersgate United Methodist Church to lead us in our prayer. Thank you."

O'Connor: "Let us pray. Gracious and almighty God, we thank you for your presence with us this evening. We thank you for the privilege of living and working in this community. We ask your blessing on this meeting tonight. Give Supervisor Auberger, the board members, and the other town leaders your wisdom and support. Guide all the discussions that take place tonight, and the decisions that are made. We also lift to you those who serve in this community. Keep them safe and give them strength and compassion to do their work. We remember also tonight those in our community who are suffering or in need. Help all of us together. Make life better for all in this community. Amen."

Auberger: "Amen. Thank you Reverend O'Connor for once again being our chaplain for this month."

3/16/04

Auberger: "We now have our moment of prayer. The Reverend Larry Wade of the First Bible Baptist Church. Reverend Wade."

Wade: "Thank you Supervisor. Join me in prayer, if you would please. Heavenly Father I want to come to you tonight and thank you for the privilege

that you have given to me to live in this great town. As I was thinking today, Lord, about my other family members. My sister doesn't get to live in a town where there's a supervisor and councilmen that are God-fearing people. My brother doesn't get to live in a town, Lord, where the citizens and the townpeople work together. Nor do my parents, and I want to thank you for that Lord. And thank you for these men and for these women. I thank you Father for the privilege that you have given to me, to know them, each one at least a little personal way. For the privilege that I have to serve them and serve with them, as we serve the citizens of this great community. Lord, may we not take the freedoms, the privileges, the opportunity that we have for granted. And Lord, I just thank you for them, and as that you would give them wisdom and direction, not only tonight, but in the days and the weeks and the months to come, and the decisions that they have to make. I pray, Father, that they might remember to look to your word for wisdom and direction. And Father that you would help us to keep you first and foremost in our lives and in our minds. We thank you for what you have done. In Christ's name I pray. Amen."

Auberger: "Amen. Thank you Reverend Wade for once again being our chaplain for the month of April–or March, excuse me.

4/20/04

Auberger: "Now ask the Reverend Barry Lawrence of the Westside Baptist Church will offer our prayer. Reverend Lawrence."

Lawrence: "Let's pray. O God we thank you and praise you that all wisdom comes from you. I want

to personally thank you for the town government you've given us in this town, for all its leaders and supervisors, and I just thank you for that. We will commit tonight to you that they will hear from you that they would have your wisdom, that they would make the decisions that are best for the town. We thank you again for the privilege we have of being part of this town and of this government in Jesus' name. Amen."

Auberger: "Amen. Thank you again Reverend Lawrence for being our chaplain for the month of April. We appreciate it."

5/18/04

Auberger: "We now have the Reverend David Linn of the English Road Alliance Church will lead us in prayer."

Linn: "Let's pray. Almighty God, we thank you for just the many wonderful things that we receive as a result of living in a good town and having good government, Lord, and a great community. Lord I think tonight of the nation of Iraq, which is most desperate for a good government to arise, and we've received the blessing of it here. They most desperately need it there. And I pray, Lord, that you would do that very thing. Lord, you are a God of order. You hate disorder, and you created all things to work harmoniously. You have even raised up government for our good, and we pray for the people of Iraq, that somehow, by some miracle, that a good government would arise in that land, that things might get down to the business of living, that the war might be over, and I realize that's a tall order, but you're a great God, and we ask for that. Lord I pray that tonight's meeting would go well and efficiently, that everyone

would think clearly, that there might be a spirit of harmony, Lord. I pray that there might not be any mistakes Lord. I pray that you would work together, everyone who's involved in the government of this great town so that great things will continue in the future. We ask these things in Jesus' name. Amen."

Auberger: "Amen. Thank you Reverend Linn for being our chaplain for the month of May. We appreciate your involvement."

6/15/04

Auberger: "We now have Father Alex Bradshaw from Our Mother of Sorrows Parish will now offer our prayer. Father Bradshaw."

Bradshaw: "Let us pray. Lord God of all creation, we give you thanks and praise for your presence and action in the world. As we gather this evening after a week of many memories, we honor first of all the late President Ronald Reagan, whose funeral was honorably and fittingly celebrated this last weekend. We give thanks for his years of public service, and most especially for being the architect of the end of communism and the Cold War. We honor too all our veterans, and in particular those of the greatest generation who liberated Europe 60 years ago following the D-Day landings in Normandy. Their example and courage continue to inspire us. It is because of them that we enjoy today the fruits of freedom and democracy. Our thoughts are constantly turned towards the Middle East. Iraq and Afghanistan have been delivered from tyranny and oppression, but they remain places of conflict and great danger. We pray for stability, democracy and good government in those countries. We pray also for the protection of our armed forces, and for the safe and

sound return of our men and women serving overseas back to their anxious families. We look with anticipation to the relaxation of summer as our children are about to finish their school year. May this time of year of sunshine and warm breezes be a time of hope for the future. We acknowledge the role of the Holy Spirit in our lives that while there is a variety of gifts there is always one and the same spirit working in different ways in different people. The particular way in which the spirit is given to each person is for a good purpose. We pray this evening for the guidance of the Holy Spirit as the Town of Greece Board meets. May the members of the board devote their attention to the agenda of this evening with an appreciation of each others' gifts and with the benefit and well-being of all the citizens whom they represent always in the forefront of their minds. Bless this Town of Greece and all who live here. Praise and glory be yours O Lord now and forever more. Amen."

Auberger: "Amen. Thank you Father Bradshaw. Thank you once again."

Smith: "Supervisor?"

Auberger: "Councilman Smith?"

Smith: "If Father Bradshaw is here still, I'd just like to congratulate him and the Our Mother of Sorrows parish on a very successful church carnival, which Father told me before the board meeting began was a record this year, a record in attendance and a record success. So, always a lot of fun at the Mother of Sorrows carnival."

Auberger: "Thank you councilman. And thank you once again Father."

7/20/04

Auberger: "We now ask the Reverend Charles Roberts, a senior pastor at John Knox Presbyterian Church to lead us in our Moment of Prayer."

Knox: "Good evening. Good evening Town Supervisor, council members, civil servants of Greece. Let us come together in prayer. Gracious sovereign Lord God, creator of the universe, the giver of all good gifts and graces, we gather this afternoon, this evening in preparation to discern your spiritual givings upon our lives. We lift up our Town of Greece to your eternal care that it may continue to be a community of respect, one of justice, one of equality, one of safety and one of peace. Gracious Lord God we remember those gifts that you give to us, and we turn to you now. I lift up to you the supervisor of this Town of Greece and the councilmen and all the civil servants who serve on behalf of the residents of Greece. Grant them wisdom and discernment for the business of the evening, but most importantly, discernment and wisdom to live faithful to the calling that they have been elected to. We also remember those who are away from this community this night. We ask that you would protect them. We would also lift up those who serve in harm's way, even now, and we remember their families and the sacrifice they give. We remember those who defend our freedom even now in Iraq or Afghanistan or other parts of the world. Lord, we pause to remember your gifts and your blessings. As we lift up those who need your healing even in our community, touch them. Let them know that you are alive, that you are a God of compassion, a God of health and holiness. Bless this opportunity that is before us this night for the work that is there we may live out our calling and grant

thee, most glory even unto our residents. In your holy name we pray. Amen."

Auberger: "Amen. Thank you Reverend Roberts for being our chaplain for the month of July."

8/17/04

Auberger: "We now have the Reverend Vince DiPaola, senior pastor, of the brand new Lakeshore Community Church on Latta Road, say our prayer for this evening. Pastor?"

DiPaola: "Well thank you Mr. Auberger. I just want to begin with just a brief reminder that as much as, as hard as you work, we thank you for serving us, and Scripture talks about how even Jesus Christ came not to be served but to serve and give his life for people, and I thank you that while you didn't go to the Cross, and we don't expect you to, that you do in many ways make tremendous sacrifices for our community, so you and the entire representatives here, I'm just thankful for all of the service you offer. So I'd like to bow and pray for you. Lord I thank you so much that . . public service is being like a servant, and I thank you that while trays and tips aren't collected, and dinners aren't brought back and forth, in a sense, sacrifices are made. Evenings are spent planning and visiting and shaking hand and smiling and encouraging and planning and thinking. And I just thank you so much for the tremendous sacrifice of these men and women in the Town of Greece. I thank you for the honor and privilege of being a pastor in a church in a town that has been so supportive and so great, and I thank you so much for it. I pray that you would guide these wonderful men and women and their decisions and their thinking. Help them to act swiftly

on what is good, help them to have pause for items that need attention and help them to hold a strong 'no' for those matters which would denigrate or hurt our community. I thank you so much that you will guide them and lead this meeting to be productive and effective so they could be content with the service with which they offer and that you would be pleased with the result of it. We ask this through Jesus' name. Amen. Thank you."

Auberger: "Amen. Thank you Reverend DiPaola for once again being our chaplain for this month."

9/21/04

Auberger: "We will now have the Reverend Patrick Medeiros, pastor of the Greece Assembly of God Church, for our moment of prayer."

Medeiros: "Father, we thank you for this day. We thank you for our town leadership, and as they discuss town business tonight, I pray for your wisdom and your guidance and your blessing upon this meeting. In Christ's name we pray, amen."

Auberger: "Amen. Thank you Pastor Pat for once again being our chaplain for this month. We appreciate it."

10/19/04

Auberger: "We now have the Reverend Anne O'Connor from Aldersgate United Methodist Church for our prayer."

O'Connor: "Let us pray. Gracious and almighty God, we thank you for the–your presence with us this evening. We thank you for the privilege of living and working in this great community and country. We thank you for those who lead and serve in the

Greece community. We thank you for the police, for the firemen and women, for the emergency medical service workers. We pray that you would keep them safe. Tonight we also give thanks for Lance Corporal Brian Schram, one of our own who has given his life in service to our country. We seek your comfort for his family and friends and for those who most keenly feel this loss. We also remember before you the men and women who serve in the armed forces. Watch over them. Keep them safe as they work to bring peace and justice throughout the world. Bless tonight's council meeting. Give our town leaders your wisdom and support. Guide their discussions and decisions. Amen."

Auberger: "Amen. Thank you Reverend O'Connor. Please rise. As the Reverend mentioned, I like to have a moment of silent prayer in honor of U.S. Marine Corporal Brian Schram."

11/16/04

Auberger: "We now have Father Frank Falletta from St. Lawrence Church. My pastor, and pastor of Rick Antelli also, to come forward for our prayer."

Falletta: "Let us pray. Heavenly Father, you guide and govern everything with order and love. Look upon this assembly of our town leaders and fill them with the spirit of their wisdom. May they always act in accordance with your will, and may their decision be for the well being of all. The Lord bless you and keep you. The Lord let his face shine upon you and be gracious to you. The Lord look upon you kindly and give you peace. Amen."

Auberger: "Thank you Father for once again being our chaplain for this evening."

2/15/05

Auberger: "We will now have the Reverend Steve Matson from the Westside Baptist Church to lead us in prayer."

Matson: "I noticed when I got here that one the agenda it said a *moment* of prayer. Whenever a pastor comes in, he can take more then a moment, so I will try to keep it very brief. To let you know, the reason I accepted this invitation and that I'm honored to be here is that I believe that leadership is called by God at any level, and that God is sovereign and has placed you men and women as leaders in this community, and as such, we should look to him for his guidance. You have a heavy responsibility and he holds you accountable, so it's good for us to go to him. My prayer, just to let you know, I'll be praying that you be men and women of wisdom, of humility and of courage. Let's go to God with these. Our Father, we know that you are sovereign over all creation. You are sovereign over this world. You are sovereign over this town. And Lord, you have placed these men and women as your servants to serve you first of all and then to serve this town and the people that live in this town, and so I pray that for them, they would have the attributes of godly leaders that would serve well. Lord, I pray that they would be men and women of great wisdom, that they would seek wisdom from you, that they would seek wise counsel, that they would listen to it and weigh it for worth, and lead out of that great wisdom and understanding. I pray that they would be men and women of humility, that their leaderships–their positions of leadership would not cause pride or arrogance, but they would sense the responsibility they have to do well, that they are totally dependent on you to guide

them. So I pray that they would be humble servants of yours and of the people within this town. I pray that you would give them courage. I pray that they would not shrink back from doing what is right and what is in order and what is good for this town as well. Lord help them to stand up for those things that this town would be blessed because of godly leadership, of leadership that does right, that this town would flourish because it reflects the kingdom of God where things are done in order. And so I bring them before you. I pray that the proceedings tonight and through this year would reflect who you are and how you are leading, for I pray it in the name of your son Jesus Christ. Amen."

Auberger: "Amen. Thank you Reverend Matson for being our chaplain for the month of February. We appreciate your involvement for this year. Thank you very much."

3/15/05

Auberger: "We now have our moment of prayer. We'd like to have Father Alex Bradshaw from Our Mother of Sorrows Church just to say our prayer for this evening. Father Bradshaw."

Bradshaw: "Let us pray. Lord, God of all creation, we give you thanks and praise for your presence and action in the world. We look with anticipation to the celebration of Holy Week and Easter. It is in the solemn events of next week that we find the very heart and center of our Christian faith. We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength, vitality, and confidence from his resurrection at Easter. Jesus Christ, who took away the sins of the world, destroyed our death, through his dying and in his rising, he has restored

our life. Blessed are you, who has raised up the Lord Jesus, you who will raise us, in our turn, and put us by His side. We pray for peace in the world, an end to terrorism, violence, conflict and war. We pray for stability, democracy and good government in those countries in which our armed forces are now serving, especially in Iraq and Afghanistan. We pray also for the protection of our armed forces and for the safe and sound return of our men and women overseas to their anxious families. May this season of the year, of Good Friday, followed by the joy of Easter, be a time of hope for the future. We acknowledge the role of the Holy Spirit in our lives. That while there is a variety of gifts, there is always one and the same spirit, working in different ways in different people. The particular way in which the spirit is given to each person is always for a good purpose. So we pray this evening for the guidance of the Holy Spirit as the Greece Town Board meets. May the members of this board devote their attention to the agenda of this evening with an appreciation of each others' gifts and with the benefit and the well-being of all the citizens whom they represent always in the forefront of their minds. Bless this Town of Greece and all who live here. Praise and glory be yours O Lord, now and forever more. Amen."

Auberger: "Amen. Thank you Father for being our chaplain for the month of March. Once again, thank you."

6/21/05

Auberger: "We will now have our moment of prayer. We have the Reverend Steve Matson of the Westside Baptist Church."

Matson: "This may not be church, but we're gonna pray anyway."

Auberger: "Right."

Both laugh.

Matson. "Let's pray. Father, we acknowledge that all authority and power resides [sic] in you. So as we come before you this evening, I pray for the men and women who sit behind me. I pray that they would acknowledge that you are the supreme ruler of all and that any authority they have, any rulership they have, is granted to them by you, by your sovereign will. I pray that that would humble them, that they are to be about your work, as under-rulers, to carry out; as you instructed us to pray, 'your will be done on earth as it is in heaven.' I pray that they would be wise in carrying out, that the issues before them this evening, that they would keep in mind that they are to rule wisely and make judgements that would be for the good of this community and would reflect your rule over us. So I pray your grace upon them that they would lead not just even out of their own abilities and knowledge and understanding, but that your spirit would guide them along and that we would find that we live in a better community because of the way they lead us. We pray it in your name, Jesus, amen."

Auberger: "Amen. Thank you Reverend Matson for being our chaplain for the month of June. We appreciate your involvement."

7/19/05

Auberger: "We now have Pastor Larry Stojkovic from Hope Lutheran Church will say our prayer for this evening."

Stojkevic: "We bow our heads to pray. Dear Heavenly Father, may the words on our coins, our currency, and may they be in our hearts this night that we trust in you. And Father we come before you this evening and we pray for forgiveness, Lord, and healing and restoration for this land. We also come before you and we give you thanks and we give you praise for the peace that we enjoy, and we know Lord that that peace came at a cost, and it still does. And so Father, tonight, we pray for those in the armed forces. We pray Lord for those in the armed forces from this community. And we pray for their families. And we pray for their families. And we ask Lord for protection and safety. And blessing Lord upon moms and dads and husbands and wives and sons and daughters who anxiously await the return of their loved ones. Father we also come before you tonight and we pray for those in law enforcement and we ask Lord for safety for them, and we give you thanks that our streets are safe because of what they do. And Lord we also pray for their families, that you would give them piece. Father, what a privilege it is to live in this land. And Lord I thank you for the privilege and for the gift of being here. And Lord you have blessed us with so many gifts, showered them upon us. And for that we give you our thanks and our praise. Lord bless this night, bless this place and all that happens and all that is said, and father we pray this in the mighty name of Jesus. Amen."

Auberger: "Amen. Thank you Pastor Larry for being our pastor for this month of July. We appreciate your coming down here this evening."

8/16/05

Auberger: "We now have the Reverend Edger Metzger of the Holy Name of Jesus Church here in the Town of Greece. Father Metzger."

Metzger: "Join me in a moment of silence. O gracious God, we know that you are with us as we begin this important meeting. Help us to proceed without rancor or distrust. Help us to disagree if need be without being disagreeable. Strengthen us with the wisdom to realize that all of us clergy and legislators are called to be servants of the people of this great town of Greece. Amen."

Auberger: "Thank you father for being our chaplain for the month of August."

9/20/05

Auberger: "We now have Pastor Robert Chappell of the Calvary Church of Greece for our moment of prayer. Thank you"

Chappell: "Thank you. It's a privilege to come and be invited to do this. It's something that's not a token thing. We pray for all of you in our congregation, and we're pleased with the body of governing people in this town. So we–it's a blessing to be able to do that. [Holding up Bible] I want to just pray a prayer that Solomon prayed. He said, 'Lord, give me an understanding heart that I might discern between good and bad for the people that we're making decisions for, that he's governing.' So we'll pray that prayer, and ask the Lord, it seems to be a good one, God honored it and blessed it with Solomon, and we'll pray for our governing board of the town. Father we thank you that you see this governing board of officials that you've raised up in this community,

and you've blessed us. And Lord I pray again, we ask for that wisdom and that understanding heart that you'd give them as they make decisions that affect this community. And we thank you for them, and we pray you'd bless them and their families. We pray that you'd use them to bless our community and to keep us safe, and Lord make wise decisions and wise council concerning us. In Jesus name we pray, amen."

Auberger: "Amen. Thank you Pastor for being our chaplain for the month of September."

10/18/05

Auberger: "We now have for our moment of pray, Father Gary Tyman from Our Lady of Mercy Church. Father Tyman."

Tyman: "Let us pray. Gracious God, we give you thanks for all those who seek to serve our community in public office. We ask that you help them and all of us to keep our minds and hearts open to your wisdom and to the needs of all your people. We ask your continued blessing upon our public officials, our town employees and all the residents of the Town of Greece, amen."

Auberger: "Amen. Thank you Father Tyman."

11/17/2005

Auberger: "We will now have Pastor Timothy Bush from the Lakeview Community Church for our moment of prayer."

Bush: "Let us join our hearts and minds together in prayer. Lord as we are here to make decisions, Lord we call on your wisdom, your care for us, Lord we ask that all decisions that are made this evening

are made to your honor and glory, and may your name be praised. And Lord we just thank you for the opportunity we have to gather together, but also the opportunity and also the responsibility that you've given us tonight, just make those decisions on behalf of the people of Greece. We pray this in our precious Lord's name, amen."

Auberger: "Amen. Thank you pastor."

12/20/05

Auberger: "We will now have our moment of prayer. We have Pastor Robert Chappell of the Calvary Chapel of Greece join us this evening."

Chappell: "What a special time of the year and a blessing to be able to do this. I'm so thankful for our community and those that serve here. We've been blessed with a peaceful community — God's blessed us tremendously and so, it reminds me of just one verse in the Bible about our Lord's coming, about the birth of Christ, which is commemorative of now. 'For unto us a child is born; unto us a son is given. And the government shall be upon his shoulder, and his name shall be called wonderful, counselor, the mighty God, the everlasting father, and the Prince of Peace.' [Isaiah 9:6] And we've enjoyed these blessings in our community, so let's thank Him. Father, we thank you for these blessings that you've given us and bestowed on us and Lord, blessing us with these men and women that have governed us. We pray that you'd continue your blessing on them. Bless their homes and their families, and we thank you that it's all because of what you've done and your son Jesus and sending him to be the Prince of Peace. And we pray for that peace upon our community. In Jesus' name. Amen."

Auberger: "Thank you [*indistinct*]. And a Merry Christmas to you."

1/17/06

Auberger: "For our moment of prayer we have Father John Corning from St. John the Evangelist Church. Father?"

Corning: "I'll start with just a word of scripture, from St. Paul's addresses to one of his communities, it's also appropriate for any group of people who gather together. 'Clothe yourselves with heartfelt mercy. With kindness, humility, meekness, and patience. Bear with one another, forgive whatever grievances you have against one another. Forgive as the Lord has forgiven you. And over all of these virtues put on love, which binds the rest together, and makes them perfect.' Heavenly Father, we pray that you will send forth your Holy Spirit upon the members of this council and all of those who assist them. May they be filled with the spirit of wisdom, with the spirit of mercy and compassion. May they make wise judgements. May they each day be peacemakers in this community and beyond. May they feel the support of all the citizens of this town that we may work together to build a community and to turn ourselves hopefully to the future. We ask this in Christ's name, amen."

Auberger: "Amen. Thank you Father."

3/21/06

Auberger: "We will now have the Reverend Tim Bush from the Lakeview Community Church lead us in our moment of prayer."

Bush: "Interesting last month. John said he wasn't at the last meeting. I wasn't either, I was supposed to be, but I'm here tonight. I had Wednesday written down, so let's have prayer together. Lord, we just thank you for our–for being a God of love. Lord as it's a difficult task in running a town, lot of decisions to be made, a lot of people to listen to and care for, we pray for your wisdom. We pray that all things are done to your honor and glory, as we pray in Jesus' name, amen."

Auberger: "Amen."

Bush: "And thanks for having me back again."

Auberger: "Thank you Reverend Bush."

4/18/06

Auberger: "We now have the Reverend George Grace from First Bible Baptist Church to lead us in our moment of prayer. Pastor Grace."

Grace: "Thank you Supervisor Auberger and distinguished people of the Town of Greece. If I may, I'd like to just read a brief portion of Scripture. I came a long way to pray."

Auberger: "Pastor Grace, you take as long as you want.

Grace: "Excuse me?"

Auberger: "You take as long as you want."

Grace: "Oh my! You don't ever do that to a minister. It's a very dangerous thing, but it's an honor to be here. And I know so many of these people very, very well. I'm honored to minister, to live in this town, and always it's an honor to come before you, and to have the opportunity to open an invocation.

'Submit yourselves to every ordinance of man, for the Lord's sake. Whether it be to the king as supreme, or unto governors, as unto them that are sent by Him, for the punishment of evildoers, and for the praise of them that do well. For so is the will of God that with welldoing, ye may put to silence the ignorance of foolish men. As free and not using your liberty for a cloak of maliciousness, but as the servants of God. Honor all men, love the brotherhood, fear God, honor the king.' That's four verses from the Scriptures. In each of those verses something is said about the responsibility that we have as citizens to our superiors, our authorities, our political figures, and also their responsibilities to us. As I came on the grounds 10 or 15 minutes ago, I just want you to know that I am impressed. I am honored to be part of this town, to live and work in the Town of Greece, and it's just such a beautiful place. The people that are on this panel that have had something, some of you a great deal, with just this complex, it's a real testimony to this town, to the people of this town. Thank you for making this possible, and I know that people have financed that, others have financed that, but it's been under your leadership and direction that this has happened, and it's a good place to be. Now Father, it is a good place to be. These dear folks behind me work hard. They have to listen to a lot of people. They have to be gracious, they have to be patient, they have to be persevering, they have to be men and women of integrity, the utmost in responsibility, Lord, they have to be intelligent, they have to be knowledgeable, they have to follow through, they have to be good supervisors, stewards of the resources of this town. Those are some difficult shoes or qualifications to fill. Bless them and their meeting tonight. Lord I know many of them are taken

away from families, friends, other possible activities, maybe more enjoyable than being in a meeting like this. But Lord bless them for their commitment, service and dedication to the town and the people of Greece. Thank you for each and every one of them. May they find some way to make up the time that has been lost tonight with those dear loved ones. Lord give them wisdom, wisdom beyond their years. Lord and remind all of us that righteousness exalteth a nation and sin is a reproach to any people. Give them wisdom as they make decisions that will affect each and every one of us in this town. May righteousness truly be exalted. In Jesus' name we pray, amen."

Auberger: "Amen. Thank you Pastor Grace for being our chaplain."

5/16/06

Auberger: "We now have the Reverend Richard Barbour from Messiah Lutheran Church for our moment of prayer."

Barbour: "It's a privilege for me to lead you in prayer this evening. Let us pray. Gracious God, you have richly blessed our nation and this community. Help us to remember your generosity and give thanks for your goodness. Bless the elected leaders of the Greece Town Board as they conduct the business of our town this evening. Give them wisdom, courage, discernment and a single-minded desire to serve the common good. We ask your blessing on all public servants, and especially on our police force, firefighters and emergency medical personnel. Finally, on this day when our community is voting on matters of public education we thank you for teacher, parents, administrators, school board members and

support staff who are dedicated to the educated and inspiration of our children. And now in the silence of our hearts we offer to you our deepest prayers. Respectful of every religious tradition, I offer this prayer in the name of God's only son Jesus Christ, the Lord, amen."

Auberger: "Amen. Thank you Reverend Barbour."

6/20/06

Auberger: "We now have the Pastor Kevin Kisler of the Covenant Orthodox Presbyterian Church to deliver our prayer."

Kisler: "Shall we pray? [Pastor Kisler spreads his arms apart.] Almighty and everlasting God — father, son, and Holy Spirit — it is with a due sense of reverence and awe that we come before you this evening seeking your blessing upon this gathering. Lord, you are a mighty and awesome God, the ruler of the nations, the king of the earth, and all authority, whether wielded in state, or in home, or in church, is derived from you as a stewardship. We ask, oh Lord, that those who render decisions this evening would do so with a due sense of responsibility, seeking that which is good and right for those over whom they govern. You are also a wise God, oh Lord, as seen in the world around us, and as evidenced even in the plan of redemption that is fulfilled in Jesus Christ. We ask that you would give freely and abundantly wisdom to one and to all this evening once again, to render those decisions that are equitable and fair and are beneficial to this community. You are a loving and benevolent God, a good god as well, and so we would ask, oh God, that you would lead one and all to have a spirit of peace

and unity to seek that which is good and loving and kind. We ask these things in the name of the Lord and Savior Jesus Christ, who lives with you and the Holy Spirit, one God for ever and ever. Amen."

Auberger: "Amen. Thank you Pastor Kisler. We appreciate your involvement here this evening and being our chaplain for the month of June. Thank you very much."

8/15/06

Auberger: "We now have the Reverend Laverne Bates from the Parkridge Free Methodist Church for our moment of prayer."

Bates: "First I'd just like to thank you for the privilege of being here. It's always just such a high privilege to be able to pray together, so let's pray. Our Heavenly Father, we thank you for the privilege of coming to you as your children to seek your blessing and guidance in our lives. Thank you that we have–that you have promised never to leave us nor forsake us, and thank you for the many privileges that we have and the resources, freedom and opportunities available to us. Continue to bless our community and help us to appreciate that every good and perfect gift comes from the father above who is changeless in his goodness. Thank you for all those providing for the safety and care of our constituency. May our police, fire and medical services along with those providing social and educational services sense our support and appreciation, and thank you for the privilege of living in a community where elected officials seek to be good stewards of the trust and responsibility given them and for the inspired leadership provided by our supervisor John Auberger. May in this meeting tonight we recognize our need of your

wisdom in our decisions and of your compassion for the needs of all people we serve. May we do our best to honor you. And while we ask for your divine guidance in our lives here at home, may those in the military and political endeavors around the world, serving our country and protected and extending freedom sense your presence, protection and guidance where they are. Give special wisdom and courage to President Bush in these very difficult and challenging days. Help all of us to trust and honor you in fulfilling the purpose you have for our lives as we work together to enrich our community, for we pray in your wonderful name. Amen."

Auberger: "Amen. Thank you Reverend Bates for being our chaplain for the month of August."

9/19/06

Auberger: "At this time, I'd like to ask to come to the podium, my pastor, and also the pastor of Councilman Antelli's [*sic*], Rev. Father Frank Falletta, from St. Lawrence Church. Father, welcome."

Falletta: "Let us pray. Heavenly Father, you guide and govern everything with order and love. Look upon this assembly of our town leaders and fill them with the spirit of your wisdom. May they always act in accordance with your will, and may their decisions be for the well being of all. We ask this in your name. [*raises hands*] The Lord bless you and keep you. The Lord let his face shine upon you and be gracious to you. The Lord look upon you kindly and give you peace. Amen."

Auberger: "Amen. Thank you Father for being our chaplain for this month. Appreciate it."

10/17/06

Auberger is absent

McCann: "Now I'd like to call on Pastor Brent Carl from the Lakeshore Community Church to conduct a prayer for us this evening."

Carl: "Good evening everybody. Would you join me in a moment of prayer? Dear God I thank you this evening that we can truly be here in a free country. So many times we take the rights and privileges we have for granted. Lord help that not be the case tonight. Thank you for your blessings, your many blessings on us every day. God as this town meeting takes place I pray that you would give wisdom, that you would give clear minds, that you would give direction to our leaders. I thank you for our leaders. I thank you for each and every man and woman who serves on this town board. I pray that you would bless their families, that you would bless their decisions tonight. Thank you that we have the honor and privilege of living in this great town. God I guess we'd just be remiss without just saying thank you for all that you have done for us. God I look around and I see some men and women in uniform. I thank you for them tonight. Thank you for their service to you, service to us, and this great country and this great town. God in closing I just pray you help our hearts and minds to be stayed on you. In your word you talk about if we need wisdom, we should come to you. So Lord tonight we ask for wisdom, we ask for clear minds, we ask for direction, and we thank you for the great country we live in. I ask these things in Jesus' name. Amen."

McCann: "Amen. Thank you pastor."

1/16/07

Auberger: "We will now have Pastor Bob Brado of First Bible Baptist Church to lead us in our moment of prayer."

Brado: "Thank you Mr. Supervisor. It's an honor to be here tonight, and I just want to say to the council and our supervisor that they do a great job and are a fine example to the rest of our community that we can follow. So would you join me in a word of prayer as we just pray for God's wisdom tonight? Father we thank you tonight that we could gather together once again, Lord, for this meeting, and, God, we just ask for your wisdom. I thank you Lord and I'd ask that you'd continue to bless this council and our supervisor as, Lord, they seek your wisdom. And, Lord, they're not ashamed of that, and I know, God, that it is no coincidence that this is one of the finest communities in all of this area, in all of the country, Lord. They set the example for us, and Lord I know it's because you've promised that you would bless the nation whose God is the Lord. And so Lord tonight as they have their agenda, God I pray that you would give them the right wisdom, the right judgments, Lord, give them the right direction. Lord as they labor in this community leadership labors for us God, we pray that you would just keep your hand upon them, give them protection, be with their families, God, and, Lord, we just want to say thank you to You for them, and Lord we ask your continued hand in blessing upon the Town of Greece and Lord, again, as the example for the rest of this community around us to follow. We pray in Jesus' name, Amen."

Auberger: "Amen. Thank you Pastor Brado for being our chaplain for this month."

3/20/07

Auberger: "We now have Father John Forni from St. John the Evangelist Church for our moment of prayer."

Forni: "From Psalm 127: 'If the Lord does not build the house, in vain do its builders labor. If the Lord does not watch over the city, in vain does the watchman keep vigil. In vain is your earlier rising; your going later to rest. You who toil for the bread you eat, when he pours gifts on his beloved while they slumber.' O God of justice and mercy, be so your gracious blessings upon the members of this town board and upon all who are gathered here. Help the deliberations this evening to be without contentiousness or any spirit of partisanship, but directed for what is good for all the residents of this town. Help us to plan well, to execute diligently and to bring to fruition the hopes that we have for the future. O God bestow your blessing upon us, upon our families, and upon all who will benefit from the activities of this evening's meeting. Amen."

Auberger: "Amen. Thank you Father."

4/17/07

Auberger: "We now have our moment of prayer. We have Bob Byjack from the First Bible Baptist Church to lead us."

Byjack: "Let's pray. Our Heavenly Father, Lord, we do think about the victims and the families, Lord, we ask that your blessing comfort and, Lord, we would just ask that you'd be in that situation. We also pray Lord that you would bless the meeting tonight. Thank you for those that are here. Thank you for those that spend the time Lord with some tough

decisions. We ask your wisdom, your guidance, and direction in Jesus' name, amen."

Auburger: "Thank you Bob."

6/19/07

Auberger: "We now have moment of prayer. Reverend Pat Medeiros, pastor of the Greece Assembly of God Church ."

Medeiros: "Heavenly Father we come before you tonight and we thank you for your blessings upon our community and Lord we thank you too for our town leaders, and as they discuss town business and have to make many decisions tonight, we just ask of you for your wisdom and your guidance, and just all the decisions that are made tonight. Bless this night and bless this meeting. We ask it in Christ's name, amen.

Auberger: "Amen. Thank you Pastor Pat for being our chaplain for this month. We sure appreciate it."

8/21/07

Auberger: "We now have our moment of prayer lead by Pastor Gary Pfeiffler of the Morningstar Christian Fellowship Church."

Pfeiffler: "We offer a prayer of petition this evening. [*inaudible*] The Holy Scripture calls this [*inaudible*] the king. We ask for great wisdom, diligently applied in all areas of discussion. Amidst the conversation and debate there can be a sense of what is right, what is just for everyone. You have entrusted to man the gift of governance, administration, and the setting of policies. [*inaudible*] But for that gift to operate effectively, with the result that at the end

of the night, we see peace in the hearts of each of the servants [*inaudible*], and peace and prosperity for all of the residents [*inaudible*]. We thank You for making Greece a safe town and the best place to live. [*inaudible*] In the name of God almighty and his son Jesus Christ.

Auberger: "Thank you pastor."

9/18/07

Auberger: "We now have Father Alex Bradshaw from Our Mother of Sorrows Parish for our moment of prayer."

Bradshaw: "Let us pray as we gather together this evening. Lord God of all creation, we give you thanks and praise for your presence and for your action in the world. In this month of September we begin a new season of they year. A different pace of life is underway again. Summer vacations are over. Schools have returned. The more gentle tempo of the summer months gives way to the busy activities of the autumn. And nature reflects the change. We see all this in the world around us. The days are cooler. Trees take on the reds, yellows and oranges of these spectacular days of fall. We give thanks for the wonderful summer that we have enjoyed, and we pray for more beautiful days ahead before the onslaught of our upstate New York winter. Among the events that are about to take place soon is the wedding of Mike Barry and Catherine Cashette [sp?] in November. We seek your blessing on their marriage. May they have a long and happy life together with the joy of children who are the delight of their hearts. May they love each other as good and faithful spouses, and as parents of their children, and may the love of their children be returned to them many times over.

On this primary day we pray too for the elections that are about to be held also in November. That at all levels of government, including at this local level, candidates may be chosen who will represent the people of this country and this community of Greece faithfully and well. With the war in Iraq and Afghanistan still unresolved we pray for peace. We pray for peace not only in the wider world, but also in our homes and local communities. We pray for the protection of our armed forces, and for the safe and sound return of our men and women serving overses to their anxious families. We acknowledge the role of the Holy Spirit in our lives, that while there is a variety of gifts, there is always one and the same spirit working in different ways in different people. The particular way in which the spirit is given to each person is for a good purpose. We pray this evening for the guidance of the Holy Spirit as the Greece Town Board meets. May the members of this board devote their attention to the agenda of this evening with an appreciation of each others' gifts and with the benefit and the well-being of all the citizens whom they represent always in the forefront of their minds. Bless this Town of Greece and all who live here. Praise and glory be yours O Lord, now and forever. Amen."

[Councilman Bilsky makes the sign of the cross]

Auberger: "Thank you Father for being our chaplain for this month."

10/16/07

Auberger: "We will now have Pastor Vince Di Paola from Lakeshore Community Church for our moment of prayer."

De Paola: "Well thank you Mr. Auberger, and thank you ladies and gentlemen of the town board. I just want you to know that I know I speak on behalf of myself and certainly I think on behalf of all of the clergy in the town of Greece that we don't consider this a little trivial thing, it's a tremendous honor to be asked to pray. So I just want to thank you again for your fine service and for the honor of letting us pray for you.

You know that every session of Congress begins with a prayer by a paid pastor or paid minister whose salary has been paid by the taxpayer since 1777. So lest we forget, this is not a new idea, and despite the objections of some, they are in the minority and they are ignorant of the history of our country. So humbly, I'd like to thank you for letting me pray and if out of respect to God you're open to bowing I would love to pray.

Father in heaven, I want to thank you so much for the Town Board and all of the support agencies of this beautiful town of Greece. I believe because of their service for You and because of Your grace we have a beautiful town that is really safe and has some beautiful people in it, and I thank You for it. I pray for this meeting that it would be a meeting that would bring honor to You and bring assistance to our people and that the men and women who leave here today would feel satisfied in what they have done. I pray for the public hearings that are going to take place, and I pray especially for the oath of office to be taken now by Joseph Robinson as a police officer. Thank you for the great work that our policemen do and I pray that all of us would have the utmost respect for their hard work and their willingness to risk their lives to protect our safety.

So again, just govern this entire meeting, help it to be pleasing and effective, and we ask all this in Jesus Christ's name. Amen."

Auberger: "Amen. Thank you Pastor Vince for being our chaplain for this month. Thank you."

11/20/07

Auberger: "We will now have Pastor Tim Bush from the Lakeside Community Church for our moment of prayer."

Bush: "Let us join our hearts together in prayer. What a privilege it is that we can serve people. Lord as I think of each of the people here tonight to make decisions and those who have requests, we just pray for your wisdom, Lord, that be instilled upon each person here that the decisions that are made will bring honor and glory to you. We pray this in Jesus' name. Amen."

Auberger: "Amen. Thank you Pastor Bush for being our chaplain for this month."

1/15/08

Auberger: "Now for our moment of prayer we have Greece resident Dave Chikovsky. Dave, please come forward."

Chikovsky: "Blessed is he who spoke, and the world came into being. Blessed is he who says and does. Blessed is he who decrees and fulfills. Blessed is he who creates the universe. Blessed is he who creates — has compassion on the earth. Blessed is he who has compassion on the creatures. Blessed is he who have rewards for all those who fear him. Blessed is he who lives forever and exists eternally. Blessed is he who redeems and saves. Blessed is his

named, blessed are you, Lord our God, king of the universe, benevolent God, merciful Father, and who is praised by the mouth of his people and exalted and glorified by the tongue of his pious ones, and is service [?] in the songs of David, your servant. We extol you Lord our God with praises and songs exalt, laud and glorify you, proclaim you king, and mention your name, our king, our God. You are our only one, the life of all words, O king praised and glorified his great name forever and ever. Blessed are you king, Lord, extolled with praises. Amen."

Auberger: "Amen. Thank you Mr. Chikovsky."

2/14/08

Auberger: "We will now have the Reverend Bob Dyjack from the First Bible Baptist Church for our moment of prayer."

Dyjack: "Let's pray. Lord we thank you for this day. Thank you Lord for getting us safely here. We pray Lord that you would help the town board to conduct the business that's before them tonight. Lord, we know that they would probably prefer to be elsewhere this evening, Lord, but we thank you for their time, their effort, and we ask Lord that you just bless the time together now in Jesus' name, amen."

Auberger: "Amen. Thank you Reverend Dyjack."

3/18/08

Auberger: "We will now have the pastor Kevin Kisler of the Covenant Orthodox Presbyterian Church for a moment of prayer."

Kisler: "Those who are willing may join me now in prayer. Almighty and everlasting God, Father, Son and Holy Spirit, I count it a great privilege this

evening to be able to come before your throne of grace asking for your mercy to be upon this meeting of the Greece Town Board. You are a great and a majestic God, the Creator of all things. Both the might of the whale breaching the ocean in the middle of the sea and the gentleness of the butterfly upon the wind, these are both your doing. The stars are set in their courses by your great power, and the snow falls by your bidding. You are a great God who rules over that which he has made. For even as Jesus himself has said, not a sparrow falls from the sky apart from your doing, and you number the very hairs of our heads, so intimate is your relationship to your world. Though you are great, you are also a God who is near to those who call upon Him, a God who calls us to ask, beseech and to knock, a God who asks us to call upon his name. In that vein Lord, I come to you this evening and ask for your gracious favor to be upon this gathering. I pray for these persons who so willingly give of themselves in service to our community. I pray that you would keep them from growing weary in well-doing, and that you would give them great joy and delight in their labors. I pray Heavenly Father as well that you would be watching over our community, restraining vice and violence, and granting us, Lord, prosperity, not only outwardly, but also of character and integrity and peaceableness. I ask, Lord, even thou, that you would continue to show you favor upon this gathering. For I pray in in the name of the Lord and Savior Jesus Christ who lives and reigns with you, and with the Holy Spirit, one God both now and forevermore, amen."

Auberger: "Amen. Thank you Pastor Kisler for being our chaplain this month."

4/15/08

Auberger: We'll now have our moment of prayer. We'll now have Jennifer Zarpentine from the Sanctuary of the Crescent Moon. Welcome."

Zarpentine: "Well being that we're in the town of Greece, I decided this evening that we're going to be invoking Greek deity, the deity of wisdom, for the board this evening. (Zarpentine breathes deeply) Great goddess Athena, great god Apollo, we ask that you impart wisdom in these proceedings today. Help the board to make the right, informed decisions that will benefit the greater good of this community. This we ask of you. As above (gestures up), so below (gestures down), so mote it be. Thank you."

Auberger: "Thank you Ms. Zarpentine. We appreciate you coming this evening."

5/20/08

Auberger: "We have now the moment of prayer. Father Louis Siriani of St. Mark's Church."

Siriani: "History is a wonderful thing, it reminds us of who we are and where we've come from, and in reflecting back on the beginnings of our nation, one of our founding fathers told us we were having a lot of arguments developing things, maybe we need to pray. So let us just take a moment to reflect on the presence of the divine love in our lives. (silence) For our prayer I have chosen a portion of the prayer given as the first prayer of the Continental Congress in 1774. Be Thou present, O God of wisdom, and direct the councils of this honorable assembly; enable them to settle things on the best and surest foundation. That truth and justice, religion and piety, prevail and flourish amongst the people. Preserve the

health of their bodies and vigor of their minds; shower down on them and the millions they here represent, such temporal blessings as Thou seest expedient for them in this world and crown them with everlasting glory in the world to come. All this we ask in the name and through the merits of Jesus Christ, Thy Son and our Savior."

Auberger: "Amen. Thank you father."

6/17/08

Auberger: "We'll now have Father Gary Tyman from our Lady of Mercy for our moment of prayer."

Tyman: "Good evening. May the Lord who went about doing good be with you. God is love. In the desire to make us share in this love he sent his son into the world to come to our aid, in gentle kindness to help those who were weak, sick or unfortunate. In his great love for all of us, Christ said that whatever we do for the least among us, we do for him. He called those who show mercy "blessed of his father," and promised them eternal life. Let us pray for God's guidance and wisdom on the members of this town board, who are devoted to helping their brothers and sisters. Brothers and sisters, listen to the words of the prophet Isaiah, 'Cry out full-throated and unsparingly. Lift up your voice like a trumpet blast. Is this the manner of fasting I wish, of keeping a day of penance: That a man bow his head like a reed, and lie in sackcloth and ashes? Do you call this a fast, a day acceptable to the Lord? This, rather, is the fasting that I wish: releasing those bound unjustly, untying the thongs of the yoke; Setting free the oppressed, breaking every yoke; Sharing your bread with the hungry, sheltering the oppressed and the homeless; Clothing the naked when you see

them, and not turning your back on your own. Then your light shall break forth like the dawn, and your wound shall quickly be healed; Your vindication shall go before you, and the glory of the Lord shall be your rear guard. Then you shall call, and the LORD will answer, you shall cry for help, and he will say: Here I am! If you remove from your midst oppression, false accusation and malicious speech; If you bestow your bread on the hungry and satisfy the afflicted; Then light shall rise for you in the darkness, and the gloom shall become for you like midday; Then the LORD will guide you always and give you plenty even on the parched land' [Isaiah 58:1,5-11]. Blessed are you Lord, God of mercy, who through your son, gave us a marvelous example of charity and the great commandment of love for each other. Send your blessings on these your servants who so generously devote themselves to helping others. When they are called on in times of need let them faithfully serve you and their neighbors. We ask this to our Lord. Amen."

Auberger: "Amen. Thank you Father. We appreciate you being here this evening."

7/15/08

Auberger: "We now have Dave Chikovsky who will lead us in our moment of prayer."

Chikovsky: "May the glory of the Lord be forever. May the Lord find delight in his works. May the name of the Lord be blessed from now on to eternity from the rising sun to its setting, and the name of the Lord is praised. The Lord is high above all nations. His glory transcends the heavens. O Lord your name is forever. Your remembrance Lord is throughout all generations. The Lord has estab-

lished his throne in the heavens and his kingship has dominion over all. The heavens will rejoice, the earth will exalt, and among the nations they will proclaim, 'The Lord reigns. The Lord was king, the Lord is king, and the Lord shall be king forever and ever. The Lord reigns for all eternity.' Amen."

Auberger: "Amen."

Chikovsky: "And I'd like to thank the board for letting me speak, and I want to thank John Auberger and my friend Rick Antelli for letting me to come here. Thank you very much."

Auberger: "Thank you Mr. Chikovsky."

[police officer sworn in]

Galloway: "My name is Susan Galloway, and I'm again talking about cable access. As I attend meeting after meeting here I see public hearings on things as far as, you know, a dance studio, a sub place, but nothing on our cable access. And supposedly in a democracy we're supposed to have open government, and Greece is not an open government. I sit at these meetings and there is absolutely no discussion about anything. When I asked Supervisor Auberger about this, he said, well, we talk about things throughout the time, and, you know, back and forth. Well, we have a right to know what's going on in our government, and it's not open government, and you're doing things behind the scenes. We find that you have sent out contracts with no public listing about who you sent information out to become part of your–to send in applications for public cable access. You have not had a public meeting. You have refused to have a public meeting despite request and request and request, but, you know, a public meeting about a sub shop, you'll have. This is our

station. It is not, you know, the government's station. I know that you have attempted various places to have it moved. I've wanted to ask why you are trying so hard to stop having the provider. I get no answers. I think that this is a crime. This is impeding our free speech as citizens. You know, there is no way to even talk to the supervisor. You know, you used to have a show on that you could call and ask questions. We can't do that anymore, you know. And there's no way to have a forum where we can ask questions and get information, you know. We're entitled to speak at this meeting, but we get no answers. I could be talking to a brick wall basically, because I get no answers, and everything is done behind the scenes. That is not democracy. I realize you are all Republicans, you are all one party, but you know what? You have a variety of constituents, and it's time that everybody is represented and heard, and I do not feel that you are representing the best interests of this community, when you are trying to give our public cable access to be run by WXXI or a private industry. This needs to be provided by somebody locally who is in our community, and it needs to be a community-based cable access, and I do not understand why you refuse to have a public hearing and answer questions publicly about what's going on, and why you want to take away it from the provider who's been doing it. His family started this before anybody else had any interest in it, and now you want to change providers with no answers on why, you want to give it to RIT, Brockport, WXXI, this is our community education and information, and way for us to freely speak and to get ideas and have discussions. And it is not to be passed off to some industry, and I would like some answers, and again I will request a public hearing to have it open, so that

people can talk about it, and we can get some real answers. And not having a meeting, setting up a meeting that's behind closed doors that the public cannot hear what is going on. This is our public access channel."

8/19/08

Auberger: We will now have Pastor John Firbo of St. Charles Borromeo Church for our moment of prayer. Father?

Firbo: Let us pray. God of all creation whose power is greater than ourselves. We pray this evening for the members of our town board who are entrusted with governance, welfare and common good of our citizens. May the work of their hands be blessed. Send the spirit of wisdom and right judgment upon them as they discuss, deliberate, listen and make decisions. As their constant companion, may their service to the citizens of the Town of Greece further the cause of harmony, peace and justice. Amen.

Auberger: Amen. Thank you Father for joining us this evening.

12/21/04 (DVD 805 at 21:50)

Auberger: "We now have the Reverend Alex Bradshaw from Our Mother of Sorrows Church for our moment of prayer. Father Bradshaw."

Bradshaw: "Let us pray. Lord God of all creation, we give thanks and praise for your presence and your action in the world. We look with anticipation to the celebration of Christmas and the birth of Jesus Christ. The message of Christmas is one of peace. Peace on Earth to people of good will. We are

living in difficult and troubled times. Our thoughts are constantly turned towards the Middle East. Iraq and Afghanistan have been delivered from tyranny and oppression but they remain places of conflict and great danger. We pray for stability, democracy and good government in those countries. We have in mind the elections that took place successfully in Afghanistan recently. We are conscious of the elections due to take place shortly in Iraq. We pray also for the protection of our armed forces and for the safe and sound return of our men and women serving overseas to their anxious families. May this festive time of year be a time of hope for the future. We will shortly begin a new year, the year of grace 2005. We pray that this new year will be a trouble-free year that brings happiness and prosperity to all here present. We acknowledge the role of the Holy Spirit in our lives, that while there is a variety of gifts, there is always one and the same spirit working in different ways in different people. The particular way in which the spirit is given to each person, is for a good purpose. We pray this evening for the guidance of the Holy Spirit as the Town Board of Greece meets. May the members of the board devote their attention to the agenda of this evening with an appreciation of each other's gifts, and with the benefit and well-being of all the citizens whom they represent in the forefront of their minds. Bless this Town of Greece and all who live here. Praise and glory be yours O Lord, now and forever. Amen. And Merry Christmas."

Auberger: "Amen. And Merry Christmas to you Father. Thank you for once again being our chaplain for this month."

1/18/05 (DVD 805 at 9:40)

Auberger: "We now have the Reverend David Lynn from the English Road Alliance Church for our moment of prayer."

Lynn: "Strangely enough, I found myself being thankful for salt on the roads, and the people who wake up at ungodly hours and throw it out there for me. I lived in L.A. for three years, and saw more cars upside down on the side of the road in L.A. than I've ever seen here, so somehow we manage to make it with all of our ice and snow and all of those things. Let's pray together. Almighty God we come before you as the great authority over all things, and you are the one who instituted government, and I thank you Lord, and we all thank you together, for good government in this country and for the good government of this town. We thank you Lord for our town that is a good place to live and a great place to raise a family. I thank you for all of the people who serve us, Lord, and the police and the ambulance and the fire department and I thank you for the public-works people who keep that salt on the road for us, Lord, so we can travel and be safe. Lord I ask for all who are participating in deliberations tonight that each one would have, in fact, wisdom beyond their abilities. I pray for those who are required to consider difficult issues having to weigh constituencies' concerns of different sorts, Lord, that they be able to come to the right conclusions. I pray for a good mindset, a positive attitude, Lord, and I pray that in each area that you will guide the process in a way that's beyond our ability even to understand, so that the right things will be done for the sake of this town. In Jesus' name, amen."

Auberger: "Thank you Reverend Lynn for once being our chaplain for the month of January."

4/19/05 (DVD 805 at 19:12)

Auberger: "We now have our moment of prayer. We welcome Reverend David Lynn of the English Road Alliance Church."

Lynn: "I was thinking of a song [*inaudible*] as a godforsaken town, and it's a recognition of the fact that there's good things in every town. We usually use that terrible phrase to describe small towns that don't have a lot going on in them, and yet there's a truth there that there's something good in every town. Our town has an abundance of good things for which we really should be thankful to God, and at the same time it should give us a little bit of humility that we have a huge heap of good things going on right here, and it kind of puts you all under responsibility to keep it all going for us here, and we thank you for the good work that you've all done, and we need to pray that God will continue to use you as instruments, so let's do that now. Heavenly Father, we thank you and bless you for the amazing abundance of blessings that we have. We thank you that you are a gracious God who gives these because that's what you're like. You love to give good things. I pray, Lord, for every person involved in the whole extended government of our town, that we might be good instruments of your grace, that we will thank you for the good things, keep the good things going. I pray for this particular meeting that there might be wisdom for every issue that comes before us. I pray that the information necessary to make the right decisions on each point might come to light. I pray that there might be a great spirit of working together for

the good of our town, and I pray this all in Jesus' name, amen."

Auberger: "Amen. Thank you Reverend Lynn for being our chaplain for the month of April."

11/21/06 (DVD 806 at 2:05)

Auberger: "We now have Pastor David Parker from Trinity Church of the Nazarene for our moment of prayer."

Parker: "A quick comment if I may. My wife and I lived in Greece for eight years while I was pastor of Trinity, and then we were called away to Easton (?), Canada. But now we're back, we are semi-retired, and we have chosen to retire in Greece. We love this place and we're happy to be back. Shall we pray? Our Heavenly Father, thank you so much for the enormous privileges that we have to live in this country, and to live in a town like Greece. We thank you Lord God for all of the benefits that are ours. And we pray especially at this season of the year that we will be filled with a sense of gratitude for all of the things that you are doing for us, and through us. Thank you for the privilege of living here. And now, Lord God, we pray that you will guide the thoughts and the decisions of this Board and this Council, and when it is all done we pray that there'll be a sense that the right things have been done, and that you have guided in everything. Lord we give you thanks, and we ask these things in Jesus' name. Amen."

Auberger: "Amen. . . . Thank you for being our pastor for this month."

12/19/06 (DVD 806 at 5:30)

Meeting hall is full

Auberger: "At this time we will now have Father Alex Bradshaw, pastor of Our Mother of Sorrows Church, lead us in our moment of prayer. Father Bradshaw."

Bradshaw: John, this would be a great day to take up collection for Our Mother of Sorrows Church.

Auberger: How about that? You all came for Father's sermon?

Bradshaw: Well, we ask the good Lord to bless not only all of you, that this gathering tonight may be one that will be to your satisfaction, and also at the same time for the benefit of the Town of Greece, but also we are very conscious of the season, that we are in the season in a matter of a few days of Christmas, and we pray that the good will and peace to all people will be what you all experience during this time that is such a wonderful time of the year.

So let us all begin.

Lord God of all creation, we give you thanks and praise for your presence and your action in the world. We look with anticipation to the celebration of Christmas and the birth of Jesus Christ. The message of Christmas is one of peace. Peace on Earth to people of good will. We are living in difficult and troubled times. Iraq and Afghanistan continue to be places of conflict and great danger, added to which are the unrest in Lebanon and Palestine, and the nuclear capability of Iran and North Korea. The threat of civil war looms alarmingly throughout the Middle East. And so we pray for stability, and for democracy and good government in those coun-

tries. We pray also for the protection of our armed forces, and for the safe and sound return of our men and women who are serving overseas back to their anxious families. May this festive time be a time of hope for the future. We will shortly begin a new year, the year of grace 2007. We pray that this new year will be a trouble-free year that brings happiness and prosperity to all who are here present. We acknowledge the role of the Holy Spirit in our lives, that while there is a variety of gifts, there is always one and the same spirit working in different ways in different people. The particular way in which the spirit is given to each person, is given for a good purpose. We pray this evening for the guidance of the Holy Spirit as the Greece Town Board meets. May the members of the board devote their attention to the agenda of this evening with an appreciation of each other's gifts, and with the benefit and wellbeing of all the citizens whom they represent always in the forefront of their minds.

Bless this town of Greece and all who live here. Praise and glory be yours, oh Lord, now and forevermore. Amen. And Merry Christmas everyone.

Auberger: "Thank you Father, and Merry Christmas to you."

7/17/07 (DVD 806 at 16:40)

Auberger: "We now have the Reverend Tim Brown, pastor of St. Charles Borromeo Parish to come say our prayer. Father Brown."

Brown: "Thank you for the invitation to be here with you this evening. Now I'd invite you to please rise for the opening prayer of this session this evening. [*all stand*] We pray God of all heaven and

earth, we invoke your care, your guidance and your spirit of life this evening. Guide this assembly of board members in their responsibilities. Guide them with your grace of wisdom. Guide them by your justice. Comfort them in your mercy and protect them with your power. Make them prudent in all their judgments. Make them steadfast in their work. Keep them patient in all they do. Keep them humble in their successes and joyful in all things. Let us pray. Watch over them O God as they go about their work. Protect them from all things that could come in conflict with serving you with sincerity and love. Keep them ever mindful of their goals. Give them the fortitude to accomplish all that they set out to do for your honor and glory, and for the good of the people they serve. May your wisdom and blessings come down upon all gathered here this evening as we raise up our prayer to you who is the God of all goodness and peace. And may God's blessings be upon the Town of Greece, its residents and public service–servants, and may God bless this Town of Greece, and may God bless America forever and ever. Amen."

Auberger: "Amen. Thank you Father Tim."

9/16/08

Auberger: We will now have the Reverend David Linn from The Savior's Chapel for our moment of prayer.

(Pause. Rev. Linn determined not to be present.)

Auberger: We'll carry on with the . . . there are no proclamations, additions, or deletions to the agenda. Madame Clerk, we will take Item #19 out of order.

(Appointment ceremonies for three police officers)

Auberger: We'll now go to Item C on the agenda for our moment of prayer. The Reverend David Linn The Savior's Chapel.

Linn: Let's pray together. Almighty God, I thank you for a great town that we have here, and a great city, and really a great state - the State of New York and a great country. Lord, you have blessed us in many ways. But tonight, Lord, I want to pray for our town. I thank you for our many public servants at every level of government. I thank you for these who have taken the oath of office as police officers tonight, and I pray that these oaths will be tremendously significant in their lives. And we know, Lord, that many have similar commitments in every branch of service to do good things. And I thank you for those who have given up more lucrative careers to do other things and have chosen to serve their communities. And I want to pray particularly tonight for our Town Board. I thank you for each one and the whole extended administration here in our town. I pray that you'd give them tremendous wisdom, Lord, perhaps even wisdom beyond their own. They have many important and difficult decisions to make. They have to weigh counterbalancing issues from different constituencies. And I pray that they would be able to make the best decisions possible in each case. May they have a sense that you are smiling down upon them as they do their work, and Lord we ask for your continued smile upon our town. In Jesus' name, Amen.

Auberger: Amen. Thank you, Reverend Linn.

10/21/08

Auberger: For our moment of prayer, Pastor Pat Medeiros from the Greece Assembly of God church.

Medeiros: Heavenly Father, we thank you for your hand of blessing upon our great community. I thank you for our leaders, and as they do the town's business tonight, we seek your face and ask that you would grant them your wisdom and your guidance as they make decisions for this community. We love you, and it's in Christ's name we pray, Amen.

Auberger: Amen. Thank you, Pastor Pat.

11/20/08

Auberger: We now have Pastor Anne O'Connor from Aldersgate Methodist Church for a moment of prayer.

O'Connor: Let's pray. Gracious and Almighty God, we thank you for your presence with us this evening. We are grateful for the privilege of living and working in this community, in this country, and for the many ways you have blessed us. In this time of uncertainty and change, we look to you for help and guidance for the leaders of our country, state, and community. Give Supervisor Auberger and the councilmembers and the officers the wisdom to lead. Direct their decisions so that are the best for the people of the Town of Greece. We also pray for those who serve in our country's military and for those who serve in our community – the police, the firefighters, the medical responders, the public workers. Keep them safe, give them strength and compassion to do their work, and help us all work together to make life better for all. In Jesus' name we pray, Amen.

Auberger: Thank you, Pastor O'Connor.

12/16/08

Auberger: Now we have a moment of prayer with Thomas Lynch, Chairman of the Local Spiritual Assembly of the Bahá'í Community of Greece. Welcome.

Lynch: To begin, let me express on behalf of the Bahá'ís of Greece our sincere thanks and appreciation for the invitation to present ourselves here.

Originating in the Persian city of Shiraz in 1844, the Bahá'í Faith has now established worldwide, with Bahá'ís residing in 16,000 localities in nearly 200 countries. We are over 5 million adherents connected by common beliefs of our mutual humanity and essential good will before God. We are administered throughout by elected consultative assemblies, and we have no clergy, except that we are each clergy. The principal of the oneness of mankind is pivotal to all the teachings of Bahá'u'lláh, and on behalf of our faith community, for the benefit of all in Greece, and for mankind in general, we offer these prayers.

O thou kind Lord, this gathering is turning to Thee, these hearts are radiant with Thy love, these minds and spirits are exhilarated by the message of Thy glad tidings. O God, let this American democracy become glorious in spiritual degrees, even as it has aspired to material degrees, and render this just government victorious. Confirm this revered nation to a raised standard of the oneness of humanity, to promulgate the most great peace, and to become, thereby, the most glorious and praiseworthy among all the nations of the world. O God, this American nation is worthy of Thy favors and is deserving of Thy mercy. Make it precious and near to Thee through Thy bounty and bestowal. *Alláh-u-Abhá*.

And also, O thou kind Lord, these are Thy servants who have gathered in this meeting, have turned onto Thy kingdom, and are in need of Thy bestowal and blessing. O thou God, manifest and make evident the signs of Thy oneness that have been deposited in all the realities of life. Reveal and unfold the virtues which Thou has made latent and concealed in these human realities. O God, we are as plants, and Thy bounty is as the rain. Refresh and cause these plants to grow through Thou bestowal. We are Thy servants. Free us from the fetters of material existence. We are ignorant, make us wise. We are dead, make us alive. We are material, endow us with spirit. We are deprived, make us the intimates of Thy mysteries. We are needy, enrich and bless us from Thy boundless treasury. O God, resuscitate us. Give us sight. Give us hearing. Familiarize us with the mysteries of life so that the secrets of Thy kingdom may become revealed to us in this world of existence and we may confess Thy oneness. Every bestowal emanates from Thee, every benediction is Thine. Thou art mighty, Thou art powerful, Thou art the giver, and Thou art the ever bounteous. *Alláh-u-Abhá*.

Thank you. I'll not take up any more of your time.

Auberger: Thank you.

Transcripts of Prayer Portions of Town Board Meetings, January-March 2009, Exhibits 615-617 to Plaintiffs' Opposition to Defendant's Motion for Summary Judgment (W.D.N.Y. Apr. 10, 2009)

1/20/09

Auberger: "We now have Pastor Kevin Kisler from Covenant Presbyterian Church for a moment of prayer."

Kisler: "You may join me in prayer. Our gracious God and Heavenly Father, it is my privilege this evening to come humbly to ask for your favor to be extended upon this meeting of the Greece Town Board. I come to ask this with confidence because of who you are. The earth is the Lord's and the fullness thereof, and everywhere around us we see evidence of your care and provision for that which you have made. From the passing of one year to the next, to the giving of all that is required for physical life, even extending to the kindness that you show day by day and moment by moment we see your goodness. We thank you that you declare yourself to be a gracious and compassionate God, slow to anger and abounding in love. And in the life and death, resurrection and ascension of the Savior Jesus Christ, the full extent of your kindness shown to the unworthy is forever demonstrated. And so we come to ask for your favor not because of our worth, but because you are good. We pray, Lord, that tonight indeed you would watch over this meeting, and that you would guide its deliberations and its decisions. I thank you for each one represented here and the departments which they serve, and I thank you for their service to our community. I pray that their labors would in

fact be a joy and delight, a source of satisfaction as they do their work with excellence. I pray that our community will be blessed of you, that your smile would be upon our families, upon our businesses, upon our schools and hospitals, and upon our churches. And I pray, Lord, that you would indeed watch over this community, that it might continue to be a place of quiet and peaceful living, that we would be able to enjoy that which you have set before us here. I pray these things now in the name of the Lord and Savior Jesus Christ, who lives and reigns with you and with the Holy Spirit, one God, both now and forever more. Amen."

Auberger: "Thank you Pastor Kisler."

2/24/09

Auberger: "We now have Father Bernard Dan, from St. Lawrence Church, for our prayer. Father Dan."

Dan: "Please let us stand again once more. Let's stand please."

(Councilmembers stand and movement can be heard from audience.)

"Let us take this moment to acknowledge our Creator, who has set before us this purpose for which we direct you today. Silently let us say a short prayer."

(Silence)

"We thank you, Lord, for a new day. We thank you for life. We thank you for strength. We thank you for our services. Today we gather here to hold this meeting in which we agree to deliberate the affairs that govern this town. We ask your knowledge-

able inspiration and wisdom. We ask you for peace. And as we discuss we will be able to come to agreement, and may whatever our agreements are be beneficial to all humanity. So we trust ourselves to you, believing that you will be with us from the beginning til the end. And after this discussion is over, will you lead us back home safely and give us the strength that we may implement what we shall discuss here. We ask this through Christ, our Lord. Amen."

(Auberger and rest of audience return to their seats.)

Auberger: "Thank you, Father."

3/17/09

Auberger: "We will now have Pastor Dave Stewart of Destiny Preparation Church for a moment of prayer."

(pauses, surveys room)

"Reverend Stewart isn't here yet. We will now go on to proclamations, additions, and deletions to the agenda. . . ."

Transcript of Prayer Portions of Town Board Meeting, April 21, 2009, Exhibit 618 to Plaintiffs' Reply in Support of Motion for Summary Judgment (W.D.N.Y. May 29, 2009)

4/21/09

Auberger: "We now have Pastor David Stewart from the Destiny Preparation Church for our moment of prayer, Pastor Stewart."

Stewart: "I'd ask you if you'd bow your heads with me. Father God, we thank you for this opportunity to come together into this place. Thank you, Lord, because enabling us to pray here means that your Spirit is allowed here, and we welcome you, Lord, into this place, even as we make decisions, Lord, for this community. I pray, O God, that your Spirit would lead and guide every thought in this place, that you would allow us to make wise decisions, Lord, decisions of prudence, decisions, O God, that will set us in the right direction. But most of all, decisions, Lord, that would honor and represent you well. I pray, O God, that your hand of blessing would remain on us as we thank you, Lord, for how you have kept this community. Lord, even in dark times, you have shown mercy and you have shown favor. You have brought blessings, Lord, in times when others have been hurt and harmed even by what's going on in the environment, Lord. But Father, we know that your hand is here, and we'll surrender into your hand, Lord, that your will would be done. I pray that you would continue to bless this community, that you would continue to raise up, Lord, your will here. That you would continue to show favor, and that your people would never forget who you are. So now Lord, we give you all the glory

in this place and pray that your will would be done. I thank you, in Jesus' name. Amen."

Auberger: "Thank you, Pastor Stewart."

Transcripts of Prayer Portions of Town Board Meetings, May-July 2009, Supplemental Exhibits 619-621 filed by Plaintiffs (W.D.N.Y. Aug. 6, 2009)

5/19/09

Auberger: "We now have Father Alex Bradshaw, pastor of Our Mother of Sorrows, for the moment of prayer. Father Bradshaw."

Bradshaw: "Good evening, everyone. Shall we pray as we begin this evening's town meeting? Lord God of all creation, we give you thanks and praise for your presence and action in the world. We are approaching the end of the Easter Season [indiscernible] Easter, the ascension of the Lord on Thursday, this week, coming at the end of the forty days of Jesus Christ's resurrection appearances, and with the Feast of Pentecost ten days later, on Sunday, May the 31st. The beauties of spring — the flowers, the blossoms, the fresh green on the trees, and the warmer weather — are an expressive symbol of the new life of the risen Christ. The Holy Spirit was sent to the apostles at Pentecost so that they would be courageous witnesses of the Good News to different regions of the Mediterranean world and beyond. The Holy Spirit continues to be the inspiration and the source of strength and virtue, which we all need in the world of today. And so we acknowledge the role of the Holy Spirit in our lives, that while there is a variety of gifts, there is always one and the same Spirit working in different ways in different people. The particular way in which the Spirit is given to each person is for a good purpose. We pray this evening for the guidance of the Holy Spirit as the Greece Town Board meets. May the members of the

Board devote their attention to the agenda this evening with an appreciation of each other's gifts and with the benefit and well-being of all the citizens whom they represent always in the forefront of their minds. Bless this Town of Greece and all who live here. Praise and glory be yours, O Lord, now and forever more. Amen."

Auberger: "Thank you, Father. Good to see you."

6/16/09

Auberger: "Now for our moment of prayer, we have Pastor George Grace from the First Bible Baptist Church."

Grace: "Once again, thank you for the invitation to be here to lead in prayer. I look forward to these opportunities, but I've been teaching from September to May every Tuesday night, and I've not been able to be here, so I'm glad that I have the chance tonight.

"Join me, if you would, in a word of prayer. Now Lord, you have said that if any man lack wisdom, let him ask of God, who giveth to all men liberally and upbraideth not. Lord, just looking at the list of things that these folks behind me will face in the next hour or two, I pray that indeed you will give them wisdom. We thank you for the good leadership here in the Town of Greece. Thank you for each one of these men and women. Thank you for their love for public service and for the Town of Greece. Bless them. Bless their families in their absence this evening, Lord, if in some way that you could make up this lost time, we would certainly appreciate it. Bless the meeting tonight. Thank you for the beautiful weather, the beautiful evening. In Jesus' name we ask these things, Amen."

Auberger: "Thank you, Pastor Grace."

7/21/09

Auberger: "We now have our moment of prayer from Father John Gagnier from Holy Name of Jesus Church. Father."

Gagnier: "Let us pray. Come to our aid, Lord, Almighty and Eternal God. You are the source of every honor and dignity, of all progress and stability. You watch over the growing human family by your gift of wisdom and your pattern of order. In [*indiscernible*] you extended the spirit of Moses to seventy wise men, who helped him to rule the great company of his people. As we open this meeting of the Town Board of Greece, grant to these servants of yours the help they need to guide our community wisely. May they be to others models of right conduct. May they be faithful to your laws, which are the foundation of all law. Together we ask this in your holy name, for you are one God forever and ever. Amen."

Auberger: "Thank you, Father."

Transcript of Prayer Portions of Town Board Meeting, Aug. 18, 2009, Supplemental Exhibit 622 filed by Plaintiffs (W.D.N.Y. Aug. 31, 2009)

8/18/09

Auberger: "Please be seated. We will now have Pastor Jim Crowley from the New Testament Church to offer a moment of prayer."

Crowley: "Thank you. First of all, I'd like to heartily thank our Town Supervisor and our Town Board for this opportunity to pray and to open up our meetings in prayer. On behalf of all God-fearing people in this town, we appreciate it. Let's pray. Dear Heavenly Father, we want to thank you for this beautiful day, and we thank you for the multitude of liberties we have as Americans, liberties we can never take for granted. We ask your blessing on this gathering tonight, Lord. God, we pray that everything on this agenda would be handled in a sincere, open, and forthright manner. We pray for divine wisdom for our town leaders, Lord. We pray that there would be a spirit of cooperation here tonight, between our leaders, town residents, town employees, Lord. And may everything that is done in this room tonight be pleasing and acceptable in your sight. In Jesus' name, Amen."

Auberger: "Thank you, Pastor Crowley."

Transcript of Prayer Portions of Town Board Meeting, Sept. 15, 2009, Supplemental Exhibit 623 filed by Plaintiffs (W.D.N.Y. Sept. 29, 2009)

9/15/09

Auberger: "We now have Father Mark Brewer, St. Charles Borromeo Church, for our moment of prayer."

Brewer: "Loving and most generous creator God, you bring us into life and sustain us with your love. May we be blessed and inspired as we gather here in service to the people of our Greece community. Guide us to faithfully serve your people, to strive for the growth and improvement to our community. May our discussions and decisions be guided by grace and wisdom to bring harmony and peace to our community. May all of our efforts this evening bring light and life to us and to the people whom we serve. We ask all of this through Christ our Lord. Amen."

Auberger: "Thank you, Father."

Transcript of Prayer Portions of Town Board Meeting, Dec. 15, 2009, Supplemental Exhibit 624 filed by Plaintiffs (W.D.N.Y. Jan. 6, 2010)

12/15/09

Auberger: "We now have our moment of prayer. I'd like to ask Pastor Herb Lawrence from Lakeshore Community Church to come forward."

Pastor Lawrence: "Let us pray. Almighty and everlasting God, as the Board gathers for tonight's meeting, I ask you to grant them courage and devotion to fulfill the duties that they have been chosen to perform, the wisdom to deal with the issues and the decisions facing them so that they might better serve you and their constituents, and your blessing on each one of them, and your blessing on our town, our county, our state, and our nation. I ask this in the name of the one whose birth we will soon celebrate, your son Jesus. Amen."

Auberger: "Thank you, Pastor Lawrence."

Transcripts of Prayer Portions of Town Board Meetings, January-June 2009, Supplemental Exhibits 625-629 filed by Plaintiffs (W.D.N.Y. July 1, 2010)

1/19/10

Auberger: "We will now have Father Louis Sirianni from St. Mark's Church for a moment of prayer."

Sirianni: "Mindful of God's presence in our lives, God's presence here with us this evening, let us pray. Almighty and eternal God, you have revealed your glory to all nations. God of power and might, wisdom and justice, through your authority, though your authority is rightly administered, laws are enacted, and judgment is decreed. We are mindful this evening of the people of Haiti, those who struggle with the loss of loved ones, those who have been injured, those who seek homes, places to — of refuge, those who seek food. Remember also all those who have gone to Haiti to help them, members of our own community and communities throughout the world. Bless and guide their work. We are mindful of all those gathered here this evening, those who guide and direct that which goes on in this town of Greece. We pray for all of them who are entrusted to guide our political welfare. May they be enabled by your powerful protection to discharge their duties with honesty and ability. We likewise commend to your unvaulted mercy all the citizens of our community, that we be blessed in the knowledge and sanctified in the observance of your holy law. May we be preserved in union and at pace which the world cannot give, and after enjoying the blessings of this life, be admitted

to those which are eternal. We pray to you who are Lord and God forever and ever."

Auberger: "Thank you, Father."

2/16/10

Auberger: "We now have Pastor Todd Lewellen from The Savior's Chapel for a moment of prayer."

Lewellen: "Let us pray. Heavenly Father, this morning, excuse me, this evening, we thank you for your presence here. We acknowledge your presence. We acknowledge your wisdom. Father, the agenda here is before you, and we pray that as each item is brought to discussion that your will be accomplished, that you would give wisdom and discernment to our Supervisor and his leadership team, and that the decisions that are made this evening would be pleasing and glorifying to your name, and that would be beneficial to our town of Greece. I pray that you would bless not only this evening our Supervisor and his team, but each day as they look to see what is best for our community, that you would give them direction, guidance, and encouragement on a day-to-day basis. And Father for each resident here in Greece, I pray for your blessings upon them, and that you would give them direction, and that you would bless us all, and that your will be accomplished. And we're going to praise you for it, for we ask this in Jesus' name."

Auberger: "Thank you, Pastor Lewellen."

3/16/10

Auberger: "We now have Pastor Larry Stojkovic from Hope Lutheran for a moment of prayer. Pastor."

Sakovich: "Please bow your heads and pray. Lord God Almighty, we thank you for this new day, this beautiful day. We also thank you Lord for this great land. Lord, put your hand of blessing upon this nation. And as we pray for this nation, Lord, we lift up to those in the military. Father, whether they be in Afghanistan or Iraq, wherever they may be in the world, even here Lord, within this nation, we pray for your hand of protection upon them and upon their families as well. We ask the same for this community, for those who watch over us and protect us in this community called Greece, we pray, Lord, that you will bless and keep them. We thank you for their service, for all that they do. Lord, so much has happened in this community. There are those who are sorrow-filled, and there are those who are sad, and there are those who are hurting. Father, may you remind us and them, that you are a God who still loves them and cares for them, and we pray Father that more and more, we would be a community who would put away violence, and anger and hatred and that we would be a community that would truly care and love for one another. Lord, we thank you for this time, and we ask Lord that you will bless this meeting now. And Lord, we ask all these things in Jesus' mighty name. Amen."

Auberger: "Thank you, Pastor."

5/18/2010

Auberger: "We now have Pastor Jim Crowley from New Testament Christian Church for a moment of prayer."

Crowley: "Let us pray together. Clearly, Father, we ask your blessing on this meeting tonight, for our town supervisor, for our town board, for everybody

that will be involved in making decisions, we pray that you grant them the wisdom of Solomon. That they would have divine understanding, keen insight, [indecipherable] all the business affairs that will be presented here this evening. Lord, we pray for everybody that will partake in this gathering. We pray that they will do so in the spirit of cooperation, that there will be openness and transparency, Lord, we pray that unity will prevail in this room tonight. Lord, we pray that in everything that is said and everything that is done, will be pleasing and acceptable in your sight, in Jesus' name. Amen."

Auberger: "Thank you, Pastor Crowley."

6/15/2010

Auberger: "We will now have Pastor Herb Lawrence from the Lakeshore Community Church for a moment of prayer. Pastor Lawrence."

Lawrence: "Let us pray. Father in Heaven, I thank you for the institution of government. I thank you that we live in America where we are free to elect our leaders. And I ask for your blessing and protection on all those who serve us. I thank you for each member of the counsel and their willingness to serve. And I pray blessing on each of them. I pray for your wisdom, your guidance, and your knowledge as they meet tonight to conduct the business of government to serve the people of the town of Greece. I pray this in Jesus' name. Amen."

Auberger: "Thank you, Pastor Lawrence."

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JUL 25 2013
OFFICE OF THE CLERK

No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Second Circuit

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a legislative-prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, who was defendant-appellee below, is the Town of Greece, New York.

Respondents, who were plaintiffs-appellants below, are Susan Galloway and Linda Stephens.

In addition, John Auberger, the Town of Greece Supervisor, was a defendant in the district court in his official capacity. The claims against Mr. Auberger were dismissed by the district court and respondents did not appeal that ruling. Pet. App. 9a-10a.

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BRIEF FOR PETITIONER

The Town of Greece, New York, respectfully submits that the judgment of the court of appeals should be reversed.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 681 F.3d 20. The order of the court of appeals denying rehearing *en banc* (Pet. App. 132a-33a) is unreported. The order of the district court (Pet. App. 28a-131a) is reported at 732 F Supp. 2d 195.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2012. The court of appeals denied rehearing *en banc* on August 8, 2012. On October 17, 2012, Justice Ginsburg extended the time within which to file a petition for certiorari to and including December 6, 2012. No. 12A366. The petition was filed on December 6, 2012, and granted on May 20, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .

U.S. Const. amend. I.

INTRODUCTION

This case concerns whether the Town of Greece, New York, can open its monthly board meetings with an invocation to solemnize the proceedings, offered by any Town resident from any faith tradition (or no faith tradition) who volunteers to speak. The Town's practice is by no means novel or unique: Both Houses of Congress have opened their legislative sessions with a prayer throughout their 224-year existence, and all fifty States and countless municipalities and counties have employed similar practices both historically and today. Each President has invoked Divine guidance on assuming office, each presidential inauguration since 1937 has included an invocation and benediction, and each session of this Court opens by asking "God" to "save the United States and this Honorable Court."

In recognition of this "unambiguous and unbroken history," this Court has unequivocally held that opening legislative sessions with invocations does not violate the Establishment Clause. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). The Court in *Marsh* understood that "[t]o invoke Divine guidance on a public body entrusted with making the laws is not" an "'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* Thus, unless the government acts with "impermissible motive" in selecting prayer-givers or "exploit[s]" "the prayer opportunity" to advance or proselytize on behalf of a particular religion, courts may not "embark on a sensitive evaluation" or "parse the content of a particular prayer." *Id.* at 793-95.

Marsh resolves this case in the Town's favor. Respondents, two residents who object to the Town's

legislative-prayer practice, do not argue that the Town intentionally discriminated among prayer-givers. Pet. App. 10a. Nor could they, as the opportunity is open to all residents, and Christian, Jewish, Bahá'í, and Wiccan adherents all delivered prayers. Pet. App. 7a-8a. Neither were the prayers "offensive in the way identified as problematic in *Marsh*," as the Second Circuit correctly concluded: "[T]hey did not preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like." Pet. App. 21a. These facts are dispositive. This Court need do no more than apply its holding in *Marsh* to conclude that the Town's prayer practice is constitutional.

Moreover, there is no justification for abandoning *Marsh*; its analysis "accords with history and faithfully reflects the understanding of the Founding Fathers." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring). The Founders understood the Religion Clauses to accomplish two related objectives: to prohibit the establishment of a national church and to ensure the freedom of conscience and religious belief for which many early American settlers fled their European homelands. *See, e.g., Everson v. Bd. of Educ.*, 330 U.S. 1, 8-14 (1947). These twin objectives guarded against the measures that Old World countries used to compel religious observance—laws requiring adherence to specific beliefs or taxes supporting particular faiths. *See id.*; *Edwards v. Aguillard*, 482 U.S. 578, 605-06 (1987) (Powell, J., concurring). But while the Establishment Clause "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship," *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), it does not require

indifference to religious observance or a sanitized quarantine of religion from public life.

To the contrary, the Religion Clauses allow the government to accommodate the spiritual needs of its citizens by solemnizing important public occasions with invocations. Legislative-prayer practices fit comfortably within those "[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage." *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). By hiring a paid chaplain and starting its own legislative sessions with an invocation, the First Congress (which drafted the Bill of Rights) understood that such civic acknowledgments of religious belief are fully compatible with the Religion Clauses. *Marsh*, 463 U.S. at 790.

The court of appeals in this case departed from *Marsh* and the historical understanding of the Religion Clauses by importing an "endorsement" test from *Allegheny* into *Marsh*. The court construed *Marsh* to require an inquiry into whether "the town's practice, viewed in its totality by an ordinary, reasonable observer, conveyed the view that the town favored or disfavored certain religious beliefs." Pet. App. 17a. Applying this test, the court concluded that the proportion of Town prayers with Christian content, among other things, "must be viewed as an endorsement of a particular religious viewpoint." Pet. App. 19a.

The lower court's focus on "endorsement" and the "reasonable observer" mirrors the much-criticized analysis employed by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and its progeny. But

Marsh rejected that approach in the legislative-prayer context, and with good reason: *Lemon* and the "endorsement" test require this Court to "sit as a national theology board," which it is "ill equipped" to do. *Allegheny*, 492 U.S. at 678 (Kennedy, J.); *see also Lee v. Weisman*, 505 U.S. 577, 592 (1992). Far from enhancing freedom of religion, a test that requires courts to invalidate prayers whose content purportedly reflects endorsement of a particular creed is bound to promote a "brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring). At least in the context of legislative prayer, the "endorsement" test has no place.

To be sure, the legislative-prayer practices of various governing bodies are likely to differ. Some legislative bodies, like the Nebraska legislature in *Marsh*, may hire a paid chaplain of a single denomination to solemnize their proceedings. Others, like the Town of Greece, may allow volunteers of any religious or nonreligious persuasion to perform that task. In the latter case, the demographics of a particular state or town may result in a significant proportion of prayers that reflect one or a small number of faith traditions. But these variations in prayer practices merely reflect the freely held and constitutionally protected religious beliefs and opinions of the people who live in a particular locality, and are no more suspect than the prayer practice affirmed in *Marsh*.

In short, there is ample breathing room between the Free Exercise and Establishment Clauses to allow the Town of Greece and other deliberative public bodies to acknowledge their citizens' religious beliefs by providing an opportunity for them to open ses-

sions with a prayer or invocation of their own choosing. The alternative—having courts act as theological censors, deciding, for example, whether particular invocations are too religious or too "sectarian"—is antithetical to the principles of religious liberty underlying the Religion Clauses. This Court should reaffirm that the centuries-old practice of legislative prayer is consistent with the Establishment Clause, and overturn the contrary decision below.

STATEMENT

1. Since 1999, the Town of Greece has allowed its citizens to open monthly board meetings with a prayer. Pet. App. 29a. To identify potential prayer-givers, the Town telephoned clergy from religious communities in the Town, using a list in the Community Guide, a publication of the Greece Chamber of Commerce. Pet. App. 31a. The Town then created a list of clergy who had accepted an invitation to offer a prayer, which the Town periodically updated based on requests from community members and new listings in the Community Guide and a local newspaper. Pet. App. 5a. Town employees would work their way down the list in advance of each meeting until they found someone willing to give the invocation. *Id.*

The prayer-giver list resulting from the Town's neutral procedures reflects a broad cross-section of religious perspectives. For example, the most recent prayer-giver list in the record includes a Jewish layman, a Mormon church, the Vietnamese Buddhist Association, an individual whose church is listed as "Cherokee Indian," two Jehovah's Witness congregations, the Bahá'í faith, a "Wiccan High Priest," a number of Catholic churches, and several Protestant

churches from a wide range of denominations. C.A. App. A1053-55.

The Town allowed any citizen to volunteer to deliver an invocation, and never rejected such a request. Pet. App. 20a. Members of many different religious traditions (including Catholicism, multiple Protestant denominations, Judaism, Bahá'í, and Wicca) accepted the opportunity to offer an invocation. Pet. App. 125a. Under the Town's practice, atheists and nonbelievers were also welcome to volunteer to give an invocation. *Id.*

The Town has never had any guidelines concerning the appropriate content for a prayer, nor has the Town ever asked to review the wording of any prayer before its delivery. Pet. App. 29a-30a. According to the court of appeals, roughly two-thirds of the prayers included uniquely Christian references; others spoke in "generically theistic terms." Pet. App. 7a. Some prayers contained specific references to other faith traditions: the Jewish layperson referred to "David, your [*i.e.*, G-d's] servant," J.A. 110a, the Bahá'í prayer-giver offered the Bahá'í greeting "*Alláh-u-Abhá*," J.A. 127a, 128a, and the Wiccan priestess invoked Athena and Apollo. J.A. 112a.

Respondents, who periodically attend Town meetings, complained to Town officials starting in September 2007 that the prayers "aligned the town with Christianity" and "were sectarian rather than secular." Pet. App. 8a. In response to these concerns, Town officials met with respondents and explained that anyone could volunteer to deliver the opening prayer and that the Town would not police the content of the prayers offered. *Id.*

2. Respondents filed suit against the Town in February 2008, alleging two Establishment Clause violations: (1) that the Town's procedure for selecting prayer-givers unconstitutionally "prefer[red] Christianity over other faiths," and (2) that the Town impermissibly permitted individual citizens to deliver "sectarian" prayers. Pet. App. 57a-58a.

With respect to the Town's selection process, the district court focused on the Town's motives for its legislative-prayer practice, and found no admissible evidence that anyone ever "intentionally excluded [members of] non-Christian faiths from offering prayers." Pet. App. 74a. The court also found "no indication that the Town established its unwritten policy of having prayer before meetings for an improper purpose." Pet. App. 121a. Accordingly, the court ruled that the Town's selection procedures did not violate the Establishment Clause. Pet. App. 78a.

As for respondents' claim that the prayers were impermissibly "sectarian," the district court observed that "[a]ny analysis of the constitutionality of legislative prayer necessarily begins with" this Court's decision in *Marsh v. Chambers*. Pet. App. 79a. The district court noted that this Court affirmed legislative-prayer practices in *Marsh* based on the unbroken history of legislative prayer in the United States. Pet. App. 79a-82a. The district court deemed legislative prayer to be an "exception to the *Lemon* test, based primarily if not exclusively on the long history of legislative prayer in Congress, which is often overtly sectarian." Pet. App. 127a.[1]

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[1] Under the *Lemon* test, a practice that touches upon religion is permissible under the Establishment Clause if it "ha[s] a secular legislative purpose"; "its principal or primary effect"

The district court noted that there was dictum in *Allegheny*, 492 U.S. at 603, suggesting that the prayers in *Marsh* were acceptable because "the particular chaplain [in that case] had removed all references to Christ." Pet. App. 129a (internal quotation marks omitted). The district court concluded, however, that this "statement does not indicate that legislative prayers must be nonsectarian." *Id.* Rather, the test under *Marsh* for evaluating the constitutionality of legislative prayer "is not whether the prayer is sectarian or nonsectarian, but whether, based on the totality of the circumstances, the prayer is being exploited to advance or disparage a belief, or to associate the government with a particular religion." Pet. App. 129a-30a.

Because the prayers offered by Town members did not "proselytize" in favor of one, or disparage any other, creed or belief, the court concluded that there was no constitutional infirmity. Pet. App. 126a, 131a. The court also found that the Town's practice of permitting "a variety of clergy to give invocations" lessened the likelihood "that the government could be viewed as advancing a particular religion, and therefore less[ened] concern over the sectarian nature of particular prayers." Pet. App. 129a.

By contrast, the court found that respondents' "proposed non-sectarian policy" was "vague and unworkable," since "many of the prayers that [respondents] say are sectarian are indistinguishable from prayers that they say are not." Pet. App. 130a-31a. Even if the Town could differentiate between sec-

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"neither advances nor inhibits religion"; and it does not "foster an excessive government entanglement with religion." 403 U.S. at 612-13 (internal quotation marks omitted).

tarian and nonsectarian prayers, the court explained that any attempt "to control the content of prayer" would impose a "state-created orthodoxy," which itself would violate the Establishment Clause. Pet. App. 130a (quoting *Lee*, 505 U.S. at 592). The court therefore granted summary judgment in favor of the Town.

3. On appeal, respondents "expressly abandoned the argument that the town intentionally discriminated against non-Christians in its selection of prayer-givers." Pet. App. 10a. Indeed, the court of appeals acknowledged that the Town had "no religious animus" in implementing its legislative-prayer practice. Pet. App. 22a. Nevertheless, the court reversed the grant of summary judgment because, in its view, "the town's prayer practice had the *effect*, even if not the purpose, of establishing religion." Pet. App. 10a (emphasis added).

The Second Circuit recognized that *Marsh* "did not employ the three-pronged test the Court had adopted, eleven years earlier, in *Lemon v. Kurtzman*." Pet. App. 10a. Nevertheless, based on Justice Blackmun's observation for the Court in *Allegheny* that the prayers in *Marsh* did not have "the *effect* of affiliating the government with any one specific faith or belief," the court of appeals proceeded to apply the "endorsement" test to evaluate the Town's prayer practices. *See* Pet. App. 17a & n.3 (internal quotation marks omitted).

In applying its "endorsement" test, the Second Circuit purported to adopt the viewpoint of an "ordinary, reasonable observer," Pet. App. 17a, and from that vantage closely scrutinized the content of the prayers offered. Pet. App. 21a-23a. The court acknowledged that the prayers delivered by Town

residents "were not offensive in the way identified as problematic in *Marsh*," that is, they did not seek to convert nonadherents or denigrate or disparage other faith traditions. Pet. App. 21a. Nevertheless, the court placed substantial weight on the fact that most of the prayers "contained uniquely Christian references," and at times were often phrased in the "first-person plural," such as "let 'us' pray." Pet. App. 20a, 23a. The court reasoned that the fact that "individuals from other faiths delivered the invocation cannot overcome the impression, created by the steady drumbeat of often specifically sectarian Christian prayers, that the town's prayer practice associated the town with the Christian religion." Pet. App. 22a.

The court concluded its analysis by cautioning government entities about the numerous purported pitfalls that could attend the practice of legislative prayer. "People with the best of intentions may be tempted," the court warned, "to convey their views of religious truth, and thereby run the risk of making others feel like outsiders." Pet. App. 26a. Even if prayer-givers resisted such temptations, "municipalities with the best of motives may still have trouble preventing the appearance of religious affiliation." *Id.* Indeed, "even a single" errant invocation may, in the court's view, "appear to suggest an affiliation" with a particular religion. Pet. App. 27a. But because governments cannot "make demands regarding the content of legislative prayers," municipalities have "few means" at their disposal to prevent prayer-givers from delivering a prayer suggesting forbidden endorsement or affiliation. *Id.* "These difficulties," the court concluded, "may well prompt municipalities to pause and think carefully before adopting legislative prayer." *Id.*

SUMMARY OF ARGUMENT

Legislative prayer is a firmly embedded practice in this Nation, long exercised by deliberative public bodies at the federal, state, and local levels to solemnize the proceedings of lawmaking institutions. Its historical pedigree, dating back to the First Congress that authored the Bill of Rights, confirms that the Establishment Clause poses no obstacle to the Town's practice of legislative prayer.

I. This case can begin and end with *Marsh v. Chambers*. *Marsh* recognized that the historical practice of legislative prayer is consistent with a proper understanding of the Establishment Clause, and is one of many ways in which government may permissibly acknowledge and accommodate the beliefs of "'a religious people whose institutions presuppose a Supreme Being.'" *Marsh*, 463 U.S. at 792 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

A. *Marsh* placed two modest limitations on the constitutionality of legislative prayer, neither of which applies here. First, the government cannot act with "impermissible motive" in selecting prayer-givers. *Id.* at 793. There is no evidence of any such religious animus here; to the contrary, any Town resident of any faith or no faith may offer the invocation. Indeed, respondents expressly abandoned any claim to the contrary. Second, the Town cannot "exploit[]" the prayer opportunity "to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-95. Again, there is no evidence of any such exploitation here. While the prayers reflected the faith traditions of the residents who delivered them, they did not preach conversion, denigrate other religious traditions, or threaten non-

adherents. Pet. App. 21a. Thus, under *Marsh*, the Town of Greece's prayer practice presents no constitutional concerns.

If anything, this is an easier case than *Marsh*. *Marsh* correctly held that there is nothing constitutionally suspect about a state hiring a single paid chaplain from one Christian denomination to offer prayers for sixteen years; indeed, Congressional chaplains have had similarly long tenures. *Marsh*, 463 U.S. at 794 n.17. Here, the prayer opportunity was open to anyone, prayer-givers were unpaid volunteers, and different individuals drawn from a multitude of faith traditions offered the invocations. These features provide additional confirmation that the Town did not improperly "exploit[]" the prayer opportunity. *Id.* at 794-95.

B. The court of appeals erred by importing an "endorsement" test from *Allegheny* to evaluate the Town's prayer practice. The court incorrectly concluded that *Allegheny*'s statement (in dictum) that the legislative chaplain in *Marsh* had "removed all references to Christ," 492 U.S. at 603, effectively modified *Marsh*'s historical test, rendering unconstitutional prayers whose "sectarian" content had the purported effect of endorsing religion. Quite simply, the "endorsement" test stands *Marsh* on its head. Whereas under *Marsh*, legislative prayer is presumptively constitutional and the government may not "parse the content" of the prayers delivered, 463 U.S. at 795, under the Second Circuit's approach, prayers that "contain[] uniquely Christian references" may convey to the "reasonable observer" that the Town is improperly affiliating itself with a particular religion. Pet. App. 17a, 20a. This Court should reaffirm that *Marsh*'s historical analysis gov-

erns the constitutionality of legislative-prayer practices.

II. *Marsh* reflects a correct understanding of the Constitution's Religion Clauses, because it "comport[s] with what history reveals was the contemporaneous understanding of [the Constitution's] guarantees." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

A. Actions taken by the First Congress are "contemporaneous and weighty evidence of [the] true meaning" of the Constitution. *Marsh*, 463 U.S. at 790 (internal quotation marks omitted). The First Congress "in the same week . . . voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states." *Id.* This history confirms that the Founders "saw no real threat to the Establishment Clause" arising from the practice of legislative prayer. *Id.* at 791.

B. Moreover, the First Congress's acceptance of legislative prayer was not merely an uncritical adoption of a vestigial practice at odds with the recently drafted Bill of Rights. Rather, it was consistent with the Framers' understanding that the Religion Clauses were adopted to protect religious liberty against the coercive practices associated with established churches—laws that taxed citizens to support a particular church or compelled adherence to particular tenets or beliefs. *See Everson*, 330 U.S. at 8-14. This Court's cases thus "disclose two limiting principles" on state action under the Establishment Clause—"government may not coerce anyone to support or participate in any religion or its exercise," and may not "give direct benefits to religion" to a degree that amounts to establishment. *Allegheny*, 492 U.S. at 659 (Kennedy, J.). At the same time, however, the

law must avoid "an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents." *Id.* at 655. But between the shoals of prohibited establishment and improper hostility lies a significant channel in which the government can permissibly "respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs." *Zorach*, 343 U.S. at 314. The First Congress and this Court in *Marsh* recognized that legislative prayer was one such permissible accommodation, no less so than higher-education grants or tax exemptions for religious organizations. 463 U.S. at 791.

C. In contrast to the liberty-centric approach to the Religion Clauses exemplified by *Marsh*, the "endorsement" test threatens to impose a "state-created orthodoxy," in which judges reviewing invocations for hints of impermissible endorsement would "put[] at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Lee*, 505 U.S. at 592. The "endorsement" test is inconsistent with a proper understanding of the Establishment Clause and, at minimum, should not invade the context of legislative prayer.

III. While *Marsh* controls this case, the Town's prayer practice would also be constitutional under any other test that the Court might apply. This Court's precedents instruct that, at minimum, longstanding historical practices such as legislative prayer do not amount to an impermissible "endorsement" of religion. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 699-701 (2005) (Breyer, J., concurring in the judgment). Thus, under any plausible application of an "endorsement" test, the Town's practices

pass muster. Similarly, if the Court were to evaluate the Town's decision to offer a prayer opportunity to all citizens, regardless of faith, as creating a "limited public forum" for private speech, the invocations voluntarily offered by individual private citizens would be constitutionally protected, as "[t]here is no Establishment Clause violation" when the government "honor[s] its duties under the Free Speech Clause" in the context of a limited public forum. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995).

ARGUMENT

I. THE TOWN OF GREECE'S PRACTICE OF OPENING ITS DELIBERATIVE SESSIONS WITH AN INVOCATION IS CONSTITUTIONAL UNDER THIS COURT'S DECISION IN *MARSH V. CHAMBERS*.

A. *MARSH* CONFIRMED THAT LEGISLATIVE PRAYER IS CONSTITUTIONAL.

In *Marsh v. Chambers*, this Court held that the "opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country," and therefore does not run afoul of the Establishment Clause. 463 U.S. at 786. In light of "the unambiguous and unbroken history" of legislative prayer stretching back "more than 200 years," the Court had "no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society" and is consistent with the Constitution. *Id.* at 792.

The Court observed that from colonial times to the present, the practice of legislative prayer "has coexisted with the principles of disestablishment and religious freedom" that animate the First Amendment's Religion Clauses. *Id.* at 786. Noting that the

First Congress approved the Establishment Clause during the same week that it passed legislation to appoint and pay a chaplain for each House, the Court concluded that it could "hardly be thought" that Congress had forbidden in the Establishment Clause "what [it] had just declared acceptable" by legislation. *Id.* at 790. Far from infringing upon citizens' religious liberties, legislative prayer was understood as conduct that "'harmonize[s] with the tenets of some or all religions.'" *Id.* at 792 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)).

Having determined that legislative prayer is presumptively consistent with the Establishment Clause, this Court held that prayer practices are constitutional so long as the government does not select prayer-givers out of an "impermissible motive" or otherwise exploit "the prayer opportunity" to "proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 793-95. Absent evidence that the government has violated these principles, courts are not to "embark on a sensitive evaluation or to parse the content of [any] particular prayer." *Id.* at 795.

Applying this test, the *Marsh* Court easily disposed of arguments that Nebraska had violated the Establishment Clause by (i) appointing the same Presbyterian clergyman as chaplain for sixteen years, (ii) paying the clergyman out of public funds, or (iii) allowing the clergyman to deliver prayers derived almost exclusively from the Judeo-Christian tradition. The Court concluded that the minister's reappointment over many years demonstrated only that his "performance and personal qualities were acceptable" to the legislature; it did not "advance[] the beliefs of a particular church." *Id.* at 793. Fur-

ther, paying the minister out of public funds did not violate the Constitution because "the same Congress that drafted the Establishment Clause" also paid its chaplain. *Id.* at 794. Finally, the Court refused to parse the content of the prayers, even though they were often explicitly Christian, because it found no evidence that the State had exploited the prayer opportunity to proselytize or to advance or disparage any faith. *Id.* at 793 n.14, 794-95.

Marsh teaches that the touchstone of the Establishment Clause inquiry in this context is whether the government acts with "impermissible motive" or "exploits" the prayer opportunity; in other words, whether the government purposely employs such prayers as a mouthpiece to advocate on behalf of a particular faith and thereby takes "the first step down the road to an establishment of religion." *Allegheny*, 492 U.S. at 664 (Kennedy, J.). Such facts, if presented in a given case, may disrupt the otherwise peaceful coexistence of legislative prayer with "the principles of disestablishment and religious freedom" underlying the Religion Clauses. *Marsh*, 463 U.S. at 786. Absent such circumstances, however, "legislative prayer presents no more potential for establishment than" a host of other practices that accommodate or provide incidental benefits to religion, such as "the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations." *Id.* at 791 (citations omitted). Indeed, as the Court observed in *Lynch*, "[i]t would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers" than legislative prayer. 465 U.S. at 674.

B. The Town's Prayer Practice Is Plainly Constitutional Under *Marsh*.

There can be no serious doubt that the Town of Greece's prayer practice is constitutional under the standard set forth in *Marsh*.

As an initial matter, there is no issue in this case about whether the Town was motivated by any improper purpose in selecting its prayer-givers. As the court of appeals noted, respondents "expressly abandoned [their] argument that the town intentionally discriminated against non-Christians in its selection of prayer-givers." Pet. App. 10a. Even if that issue had been preserved, moreover, the result would be the same, because there is "no evidence" that the Town would not "have accepted any and all volunteers who asked to give [a] prayer" to open a Town board meeting. Pet. App. 20a. Thus, under *Marsh*, the only question is whether the Town exploited the prayer opportunity to "proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95. Respondents cannot show that the Town violated this principle; indeed, the entire record is to the contrary.

The Town made reasonable, good-faith efforts to open the opportunity to diverse prayer-givers. The Town used various sources to identify potential prayer-givers and contacted them in random order to gauge their interest in offering the prayer to open board meetings. Pet. App. 31a. Further, the Town placed no restrictions on who could volunteer to offer the prayer. Pet. App. 20a. As a result, representatives from many different religions, including Catholics, Protestants of multiple denominations, a Wiccan priestess, a leader of a Bahá'í assembly, and a lay Jewish man, have given opening prayers at board

meetings. Pet. App. 125a. And it is undisputed that the Town would have welcomed atheists and nonbelievers to open the meeting with a statement of their choosing. Pet. App. 4a, 20a.

To be sure, a majority of prayer-givers were Christian. Pet. App. 19a. But that fact does not support the conclusion that the Town exploited the prayer opportunity to proselytize or to advance or disparage any faith. Indeed, the *Marsh* Court refused to take that inferential leap even though the prayer-giver in that case was from a single Christian denomination and offered the State's often explicitly Christian prayers for sixteen consecutive years. 463 U.S. at 793. Rather than infer impermissible advancement of religion, the Court accepted a more benign explanation for the chaplain's consistent reappointment: adequate job performance. *Id.* The explanation for the prevalence of Christian prayer-givers in the Town is at least equally benign: "local demographics and the choices of religious leaders who responded out of their own initiative to the [Town's] invitation." *Rubin v. City of Lancaster*, 710 F.3d 1087, 1098 (9th Cir. 2013) (internal quotation marks omitted); *see* Pet. App. 125a (respondents "could not identify a single non-Christian house of worship in the Town, despite having lived there for decades").

Other aspects of the Town's prayer practice further serve to demonstrate that the Town did not impermissibly exploit the prayer opportunity. As the Second Circuit acknowledged, the "prayers in the record were not offensive in the way identified as problematic in *Marsh*: they did not preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like." Pet. App. 21a. Thus it is

irrelevant that roughly two-thirds of the prayers allegedly included uniquely Christian references. Pet. App. 7a. Moreover, the content of the prayers cannot be ascribed to the Town because, consistent with this Court's opinion in *Lee*, 505 U.S. at 588, the Town exercised no editorial control over the invocations and affirmed that it would not review or censor prayers. Pet. App. 4a.

If anything, this case is even further from the constitutional line than was *Marsh*, for at least two reasons. First, the Town permitted multiple prayer-givers from a variety of faiths to offer prayers, rather than selecting one prayer-giver from a single denomination. This Court correctly held in *Marsh* that one cannot "perceive *any* suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church," 463 U.S. at 793 (emphasis added); it follows *a fortiori* that allowing clergy and laypeople from a variety of denominations to offer invocations does not advance one specific set of beliefs.

Second, the Town's prayer-givers were volunteers and not paid out of government funds. As a result, the Town's involvement in supporting the prayer opportunity was limited to providing a forum for others to speak. As *Marsh* confirmed, employing a paid chaplain does not raise constitutional concerns; indeed, legislative chaplains have been a fixture since the Founding. 463 U.S. at 794; *see also Rosenberger*, 515 U.S. at 858 (Thomas, J., concurring). But the Town's use of private volunteers in lieu of a paid chaplain further separates the Town from identification with the prayers delivered. Under the Town's policy, citizens first volunteer to give the opening invocation and then choose the content of their invocations without any governmental interference or over-

sight. This critical element of private choice ensures that no "imprimatur of state approval" can be deemed to have been conferred on any particular religion, or on religion generally. *Widmar v. Vincent*, 454 U.S. 263, 274 (1981); *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (holding that a neutral government program that aids religion only as a result of "genuine and independent private choice . . . is not readily subject to challenge under the Establishment Clause").

For the foregoing reasons, the Town's prayer practice is well within the bounds established by *Marsh*. Under this Court's controlling precedent, therefore, its constitutionality cannot be in doubt.

C. There Is No Basis For Importing *Allegheny*'s "Endorsement" Test Into The *Marsh* Analysis.

Rather than applying the straightforward, historically grounded analysis from *Marsh*, the Second Circuit erroneously imported into the legislative-prayer context an "endorsement" test sometimes used to evaluate other Establishment Clause challenges in cases like *Allegheny*.[2] According to that

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[2] As the *Allegheny* Court observed, the first sustained treatment of this test appears in Justice O'Connor's concurrence in *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). This Court has since applied elements of the "endorsement" test in Establishment Clause cases, but only selectively. *Compare McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 866-68 (2005) (applying objective-observer inquiry to one courthouse display of Ten Commandments), *with Van Orden*, 545 U.S. at 686 (plurality opinion) (applying an analysis "driven both by the nature of the monument [at issue] and by our Nation's history" to another Ten Commandments display), *and id.* at 700 (Breyer, J., con-

test, the relevant question is not whether the Town has exploited a presumptively constitutional prayer opportunity, but whether, when viewed in context by an "ordinary, reasonable observer," it could "be seen as endorsing a particular faith or creed over others." Pet. App. 17a, 25a. Thus, in spite of its inability to "ascribe [any] religious animus to the town or its leaders," and its conclusion that the prayers "were not offensive in the way identified as problematic in *Marsh*," Pet. App. 21a-22a, the court of appeals nonetheless held that the Town's prayer practice violated the Establishment Clause because in the court's view it "had the *effect*, even if not the purpose, of establishing religion." Pet. App. 10a (emphasis added).

The decision below adopted this observer-based "endorsement" test based on language in *Allegheny* stating that "*Marsh* had found that the prayers did not 'have the *effect* of affiliating the government with any one specific faith or belief.'" Pet. App. 17a n.3 (quoting *Allegheny*, 492 U.S. at 603).[3] *Allegheny*, however, cannot bear the weight that the court of appeals placed on it.

In *Allegheny*, this Court concluded that the display of a crèche on the staircase of a local government building during the Christmas season violated the Establishment Clause because it had the "effect of endorsing a patently Christian message." 492 U.S.

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curring in the judgment) ("I see no test-related substitute for the exercise of legal judgment.").

[3] Other courts of appeals have likewise read *Marsh* and *Allegheny* to require an inquiry into endorsement and have held that "sectarian" prayers therefore violate the Establishment Clause. *See, e.g.*, *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 347-48 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012). That approach reflects a misreading of the precedents.

at 601. Justice Kennedy, joined by three others, dissented in part and urged the Court to apply *Marsh*'s historical approach to the crèche display. *Id.* at 669-70 (Kennedy, J.).

Justice Kennedy observed that it is "settled law that," whatever else the Establishment Clause does, it does not invalidate historical practices like legislative prayer "that, by tradition, have informed our First Amendment jurisprudence." *Id.* at 669. He concluded that the crèche display posed no more threat to religious liberty than the practice of legislative prayer, because there was "no suggestion here that the government's power to coerce has been used to further" religion "in any way." *Id.* at 664.

In response, writing for the Court, Justice Blackmun sought to cabin *Marsh*'s holding to the historical practice of legislative invocation. *See id.* at 602-03. He also suggested that even this Court's opinion in *Marsh* could not justify prayers that, for example, "demonstrate the government's allegiance to a particular sect or creed." *Id.* at 603. He added dictum to the effect that the Court had not confronted this situation in *Marsh* because the chaplain in that case had eliminated the possibility of a constitutional violation by "remov[ing] all references to Christ." *Id.* (internal quotation marks omitted).

Allegheny could not and did not modify the *Marsh* test or announce a new standard for assessing whether "sectarian" references are constitutionally impermissible in a legislative invocation. The constitutionality of legislative prayer was not at issue in *Allegheny*, and Justice Blackmun's dictum was therefore unnecessary to the disposition of the case. Such "[d]ictum settles nothing, even in the court that ut-

ters it." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 351 n.12 (2005).

The *Allegheny* majority's characterizations of *Marsh* also lack precedential force because they are demonstrably incorrect. According to Justice Blackmun, *Marsh* "recognized that" the Establishment Clause prohibits "legislative prayers that have the effect of affiliating the government with any one specific faith or belief." *Allegheny*, 492 U.S. at 603 (citing *Marsh*, 463 U.S. at 794-95). In reality, however, *Marsh* is silent on the questions of "effect" and "affiliation." Rather, under *Marsh*, the criterion used to evaluate a legislative-prayer practice is whether the government has exploited the prayer opportunity to advance or proselytize in favor of one faith or to denigrate others, or has acted out of religious animus in selecting prayer-givers. *Marsh*, 463 U.S. at 793-95; *see also id.* at 823 n.1 (Stevens, J., dissenting) (observing that *Marsh* "makes the subjective motivation of legislators *the decisive criterion* for judging the constitutionality of a state legislative practice" (emphasis added)). In fact, far from forbidding any hint of affiliation, *Marsh* upheld the practice of hiring a paid chaplain belonging to a single religious denomination who offered prayers in the tradition of that denomination.

Further, Justice Blackmun's assertion that the prayers in *Marsh* "did not violate" his "affiliat[ion]" test "because the particular chaplain had 'removed all references to Christ'" after 1980 is contrary to the reasoning and record in *Marsh*. *Allegheny*, 492 U.S. at 603 (quoting *Marsh*, 463 U.S. at 793 n.14). The prayers after 1980 were not even part of the *Marsh* record and could not have been the basis of the Court's holding. *Marsh*, 463 U.S. at 793 n.14; *see al-*

so Van Orden, 545 U.S. at 688 n.8 (plurality opinion) (noting that "[i]n *Marsh*, the prayers were often explicitly Christian" and that references to Christ were not removed until the year after the suit was filed). And voluntary cessation could not have saved an unlawful practice in any event. *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968). Further, the "Christological references" in many of the prayers at issue were a primary basis for both dissents in *Marsh*. *Marsh*, 463 U.S. at 800 n.9 (Brennan, J., dissenting); *id.* at 823-24 & n.2 (Stevens, J., dissenting); *see also* Brief of *Amicus Curiae* Rev. Dr. Robert E. Palmer Supporting Petitioner ("Palmer Br.") at 5-10, No. 12-696 (Jan. 7, 2013). In any event, even after 1980, the prayers were still offered "in the Judeo-Christian tradition." *Marsh*, 463 U.S. at 793. These facts conclusively demonstrate that Justice Blackmun was incorrect in concluding that *Marsh*'s holding turned on the removal of "sectarian" references from the prayers.

Finally, *Marsh* itself made clear that the presence or absence of references to Christ was irrelevant to its analysis. According to *Marsh*, the "content of the prayer[s] is of no concern to judges" absent evidence "that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U.S. at 794-95. In other words, the *Marsh* Court had no occasion to weigh the presence or absence of references to Christ, because that issue has no constitutional significance under the Court's test.

Allegheny's dictum thus cannot be taken as a correct or binding description of *Marsh*'s reasoning. It therefore does not undermine *Marsh*'s holding that deliberative public bodies, like the Town's board, do

not violate the Establishment Clause when they follow in the Founders' footsteps and open their sessions with prayers, so long as their decision to do so is not motivated by a desire to proselytize or to advance or disparage a particular faith.

II. *MARSH*'S HISTORICAL, LIBERTY-FOCUSED ANALYSIS IS CONSISTENT WITH A PROPER UNDERSTANDING OF THE ESTABLISHMENT CLAUSE.

The Town's prayer practice is constitutional not only because it follows directly from this Court's holding in *Marsh*, but also because *Marsh* itself is indisputably correct in its analysis of history and its understanding of the Establishment Clause. This Court's Establishment Clause cases "have recognized the special relevance in this area of Mr. Justice Holmes' comment that 'a page of history is worth a volume of logic.'" *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 777 n.33 (1973) (citation omitted). There is no basis in the many pages of history underlying the Establishment Clause for this Court to abandon *Marsh* in favor of an "endorsement" test.

A. THE *MARSH* COURT CORRECTLY RELIED ON THE HISTORICAL PRACTICES OF THE FIRST CONGRESS, WHICH HAVE BEEN RATIFIED BY TWO CENTURIES OF HISTORY.

1. Interpretation of the Establishment Clause must "compor[t] with what history reveals was the contemporaneous understanding of its guarantees." *Lynch*, 465 U.S. at 673; *see also Allegheny*, 492 U.S. at 670 (Kennedy, J.) ("*Marsh* stands for the proposition" that "the meaning of the [Establishment] Clause is to be determined by reference to historical practices and understanding."). The practice of open-

ing sessions of deliberative public bodies with invocations was well known and accepted by the same generation that adopted the Constitution's Religion Clauses, including the First Congress that drafted the clauses.

The actions of "the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument," are "contemporaneous and weighty evidence of its true meaning." *Marsh*, 463 U.S. at 790 (internal quotation marks omitted). It "was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of the fundamental instrument." *Myers v. United States*, 272 U.S. 52, 174-75 (1926).

Beginning in 1774, the Continental Congress "adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain." *Marsh*, 463 U.S. at 787.[4] The First Congress continued this tradition, "adopt[ing] the policy of selecting a chaplain to open each session with prayer." *Id.* at 788. In April 1789, both the Senate and House of Representatives appointed committees to consider the manner in which chaplains should be selected. *See, e.g.*, 1 Annals of Cong. 19 (1789) (Joseph Gales ed., 1834). And on September 22, 1789, President Washington signed into law a statute appropriating payment for these chaplains. *See* 1 Stat. 71 (1789). James Madison, draftsman of the Establishment

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[4] The first prayer before the Continental Congress concluded: "All this we ask in the name and through the merits of Jesus Christ, Thy Son and our Savior." Rev. Jacob Duché, First Prayer of the Continental Congress (Sept. 7, 1774), Office of the Chaplain: U.S. House of Representatives, http://chaplain.house.gov/archive/continental.html.

Clause, sat on the House Committee tasked with considering the manner in which chaplains should be selected, 1 Annals of Cong. 104-05 (1789) (Joseph Gales ed., 1834), and voted for the bill authorizing payment. *Id.* at 688.[5] This vote occurred the very same week that the First Congress approved a draft of the Establishment Clause for submission to the States. *Marsh*, 463 U.S. at 790.

The First Congress did not adopt legislative prayer without reflection; to the contrary, the vote followed a period of vigorous debate. *Id.* at 791. John Jay and John Rutledge objected to opening the first session of the Continental Congress with prayer, because the delegates "'were so divided in religious sentiments'" that they "'could not join in the same act of worship.'" *Id.* Samuel Adams replied that "'he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country.'" *Id.* at 792 (quoting Charles Frances Adams, *Familiar Letters of John Adams and his Wife, Abigail Adams, During the Revolution* 37-38 (1875)). As *Marsh* explained, this "evidence of opposition to a measure . . . infuses [the historical argument] with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society." *Marsh*, 463 U.S. at 791. That Adams' view carried the day demonstrates that the Founders were satisfied that legislative prayer was consistent with their aspirations for the new country's Constitution.

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[5] The First Congress appointed two chaplains of different Christian denominations who alternated between the House and Senate on a weekly basis. *See* 463 U.S. at 793 n.13.

This historical evidence "sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought the Clause applied to the practice authorized by the First Congress." *Id.* at 790. The First Congress's action in authorizing legislative prayer at the same time it drafted the Establishment Clause is overwhelming evidence that it deemed such prayer practices constitutional.

2. The actions of the First Congress are not the only historical evidence showing that public prayer at government functions is consistent with a proper interpretation of the Establishment Clause. Rather, that evidence is confirmed by an "unambiguous and unbroken history of more than 200 years." *Id.* at 792. Our national history "is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Lynch*, 465 U.S. at 675. This "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789," *id.* at 674, confirms that *Marsh* correctly understood and applied the Establishment Clause.

Congress. Congress has continued to open its sessions with prayer, without interruption, over the 224 years that have elapsed since the First Congress sat. "These legislative prayers . . . are extended, thoughtful invocations and prayers for Divine guidance. They are given, as they have been since 1789, by clergy appointed as official chaplains and paid from the Treasury of the United States." *Wallace v. Jaffree*, 472 U.S. 38, 85 (1985) (Burger, C.J., dissenting).

Throughout our history, the offered prayers have often been explicitly Christian, and the conscience of the prayer-givers has dictated the prayers' content. One of the Senate's first chaplains, Episcopal Bishop William White, often began the Senate's sessions with the Lord's Prayer, the Collect for Ash Wednesday, a prayer for Congress, and a prayer for "the grace of our Lord Jesus Christ." Bird Wilson, *Memoir of the Life of the Right Reverend William White, D.D., Bishop of the Protestant Episcopal Church of the State of Pennsylvania* 322 (1839) (Letter to Rev. Henry V.D. Johns, Dec. 29, 1830). Many of these prayers contain explicit Christological references. *See, e.g.*, A Prayer for Congress, *The Book of Common Prayer* (Philadelphia, Hall & Sellers 1790) ("[W]e humbly beg in the Name and mediation of Jesus Christ, our most blessed Lord and Saviour.").

Fast-forwarding to the present day, the most recently published pages of the Congressional Record are replete with prayers that refer specifically to Jesus or other deities or prophets. *See, e.g.*, 158 Cong. Rec. H5633 (daily ed. Aug. 2, 2012) (Imam Nayyar Imam) ("The final prophet of God, Muhammad, peace be upon him, stated . . . ."); 158 Cong. Rec. H4786 (daily ed. July 11, 2012) (Rabbi David Algaze) ("[A]s the prophet Zachariah proclaimed: 'On that day, God shall be One, and His Name one.'"); 158 Cong. Rec. S4379 (daily ed. June 21, 2012) (Rev. Ron McCrary) ("This we pray in the matchless name of Jesus Christ our Lord."); Brief of Members of Congress as *Amici Curiae* in Support of Petitioner at 20-21, No. 12-696 (Jan. 7, 2013). Under the Second Circuit's decision, this practice and these prayers would violate the Establishment Clause.

Public laws have also long required public invocations of Divine guidance. For example, the U.S. Code directs the President to "each year issue a proclamation designating the first Thursday in May as National Day of Prayer on which the people of the United States may turn to God in prayer." 36 U.S.C. § 119; *see also* 1 Annals of Cong. 949-50 (J. Gales ed., 1834). The Code likewise requires that our national motto, "In God we trust," 36 U.S.C. § 302, be prominently displayed on every coin and paper bill. 31 U.S.C. §§ 5112(d)(1), 5114(b).[6]

The Executive. Religious acknowledgment has also permeated the activities of the Executive Branch since the Founding. Each President from George Washington to Barack Obama has, "upon assuming his office," invoked "the protection and help of God." *Engel v. Vitale*, 370 U.S. 421, 446 & n.3 (1962) (Stewart, J., dissenting).[7] President Washington, for example, stated that "it would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe." *Id.* at 446 n.3. Presidents Jefferson and Madison—both often cited as advocates for strict separation between church and state—likewise invoked Divine blessing in their inaugural addresses. *Id.* And President Obama, in his 2013 inaugural ad-

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[6] *See also* Joint Resolution Authorizing and Requesting the President To Proclaim 1983 as the "Year of the Bible," Pub. L. No. 97-280, 96 Stat. 1211 (1982); 36 U.S.C. § 116 (requiring the President to call "on the people of the United States to observe Memorial Day by praying" and to designate "a period of time on Memorial Day during which the people may unite in prayer").

[7] *See also* Chronology of Inaugural Addresses, Joint Congressional Committee on Inaugural Ceremonies, http://www.inaugural.senate.gov/swearing-in/addresses.

dress, stated that "the oath I have sworn before you today" was "an oath to God and country," and asked that "[God] forever bless these United States of America."[8]

Each Presidential inauguration since 1937 has likewise included both an invocation and a benediction.[9] Many of these prayers were explicitly Christian and used the first-person plural, both of which the court of appeals deemed to be evidence of an impermissible endorsement of religion. Pet. App. 22a-23a, 26a. To cite two of the many examples, the invocation at President Carter's inaugural concluded with, "[a]ll this we ask in the name of Jesus Christ, Thy Son and our Savior. Amen." 123 Cong. Rec. 1862 (1977). President Obama's second inauguration included an invocation from Myrlie Evers-Williams that concluded by stating, "[i]n Jesus's name and the name of all who are holy and right, we pray. Amen." 159 Cong. Rec. S184 (daily ed. Jan. 22, 2013).

Moreover, Presidents Washington, Adams, and Madison, and every President since Lincoln have issued Thanksgiving Proclamations calling for a national day of celebration and prayer. President Franklin Roosevelt similarly suggested that the period between Thanksgiving and Christmas be devoted to "a nationwide reading of the Holy Scriptures" so that "we may bear more earnest witness to our gratitude to Almighty God." Proclamation No. 2629, 58

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[8] Second Inaugural Address of President Barack Obama, *available at* http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama.

[9] *See also* Chronology of Swearing-In Events, Joint Congressional Committee on Inaugural Ceremonies, http://www.inaugural.senate.gov/swearing-in/chronology.

Stat. 1160 (1944). Many of these proclamations—part of our national heritage from the Founding and consistent with a reasoned understanding of the Establishment Clause—would likely fail the Second Circuit's "endorsement" test.

The Judiciary. Public prayer has also long been part of the functions of the Judicial Branch. The phrase "God save this Honorable Court," or a close variation thereof, has been part of the traditional opening of this Court's sessions since at least the Marshall Court. 1 Charles Warren, *The Supreme Court in United States History* 469 (1922). And when riding circuit, John Jay, the first Chief Justice of the United States, invited clergymen to open court sessions with prayer. John Jay to Richard Law (Mar. 10, 1790), *reprinted in* 2 *Documentary History of the Supreme Court of the United States, 1789-1800* ("*Documentary History*"), at 13-14 (Maeva Marcus et al. eds., 1988). Other Supreme Court Justices also followed this tradition. *E.g.*, Columbian Centinel (Oct. 17, 1792), *reprinted in* 2 *Documentary History*, at 317 ("After the Rev. Dr. Lathrop had addressed the throne of Grace, in prayer, the Hon. Judge Iredell gave an elegant charge to the jury, and the business of the session commenced.").

The Constitution itself, which this Court is charged with protecting, evinces the Framers' belief that public religious devotions are consistent with the rights granted and protected by the Establishment Clause. The Oath Clauses suggest that both national and state leaders are publicly undertaking a solemn or religious duty when they pledge fidelity to the laws and Constitution of the Republic. *See* U.S. Const. art. II, § 1, cl. 8 ("Before he enter on the Execution of his Office, [the President] shall take the fol-

lowing Oath or Affirmation . . "); *see also id.* art. VI, cl. 3. At the time the Constitution was adopted, the contemporary meaning of the word "oath" referred to the invocation of God as a witness to the undertaking of the obligation. *See* 2 Samuel Johnson, *A Dictionary of the English Language* (1755) (defining oath as "[a]n affirmation, negation, or promise, corroborated by the attestation of the Divine Being").

The "unbroken practice" of all three branches of the federal government "is not something to be lightly cast aside." *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970). Like the prayer practice upheld in *Marsh*, the Town's prayer practice reflects this long and unbroken tradition of civic invocation of the Divine, and is plainly consistent with the Establishment Clause, as understood by its drafters and throughout this Nation's history.

B. Civic Acknowledgements Of Religion That Do Not Threaten The Establishment Of An Official Religion Or Coerce Adherence To A Particular Faith Do Not Violate The Establishment Clause.

Marsh rests on the premise that civic acknowledgments of religious belief, like legislative prayer, are consistent with the "principles of disestablishment and religious freedom" that animate the First Amendment's Religion Clauses, and are among the ways in which government may permissibly accommodate religious beliefs without establishing an official religion. 463 U.S. at 786, 792. A proper understanding of what the Religion Clauses were designed to accomplish confirms the correctness of that premise.

The Establishment Clause was designed to prohibit the establishment of a national religion of the sort that existed in Europe in the colonial era and at the time of the Founding. *Edwards*, 482 U.S. at 605 (Powell, J., concurring). As understood by the Founders, governments "established" religion either by compelling the payment of taxes to support a favored religion or by compelling obedience to the tenets of a particular faith. *See Everson*, 330 U.S. at 8-14; *id.* at 8 (explaining that the Framers understood that the country was founded by settlers who "came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches").

Even James Madison and Thomas Jefferson described their concerns about establishment in terms of coercion. Madison's *Memorial and Remonstrance Against Religious Assessments*, which predates the Constitution, is considered to be the fullest expression of his views regarding religious establishments. Madison drafted his Remonstrance in response to a proposal to tax Virginia citizens in order to support teachers of the Christian religion. *Edwards*, 482 U.S. at 606 (Powell, J., concurring). Madison's primary fear was that the bill would be a "dangerous abuse of power" if it were "armed with the sanctions of a law." *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* 8 The Papers of James Madison 298, 299 (Robert A. Rutland et al. eds., 1973). According to Madison, religion should be the product of "reason and conviction" rather than "force or violence." *Id.* Thus, "compulsive support" of religion—including by means of a tax—should be unlawful, and "attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens,

tend to enervate the laws in general." *Id.* at 301, 303.

In place of the bill to provide taxpayer funds to teachers of Christianity, Virginia enacted Thomas Jefferson's "Act for Establishing Religious Freedom." Jefferson's bill focused likewise on coercion and was aimed at preventing Virginia from "compel[ing]" people "to frequent or support any religious worship, place, or ministry whatsoever," and from causing people to "suffer, on account of [their] religious opinions or belief[s]." *A Bill for Establishing Religious Freedom*, *reprinted in* 2 The Papers of Thomas Jefferson 546 (Julian P. Boyd ed., 1950).

As a Member of Congress, Madison's concerns about religious establishments continued to focus on coercion, even during the debates regarding the Establishment Clause itself. *See Wallace*, 472 U.S. at 92-98 (Rehnquist, J., dissenting) (detailing Madison's involvement in drafting the Religion Clauses). According to Madison, the meaning of the Establishment Clause was that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 Annals of Cong. 730 (1789) (J. Gales ed., 1834). The motivating concern behind the Establishment Clause was that "one sect might obtain a pre-eminence, or two combine together, and establish a religion *to which they would compel others to conform*." *Id.* at 731 (emphasis added). According to Madison, the government cannot "compel men to worship God in any manner contrary to their conscience" or compel them to conform to any religion not of their own choosing. *Id.* at 730. In short, "the historical evidence overwhelmingly supports the coercion test." Michael Stokes Paulsen,

Lemon *Is Dead*, 43 Case W. Res. L. Rev. 795, 826 n.115 (1993) (collecting authorities).

Under a proper, historical reading of the Establishment Clause, government may not "coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" *Allegheny*, 492 U.S. at 659 (Kennedy, J.) (quoting *Lynch*, 465 U.S. at 678). Respect for religious liberty does not, however, demand a "relentless extirpation of all contact between government and religion." *Id.* at 657. In the space between interference with religious freedom and establishment of an official religion, "there is room for play in the joints." *Walz*, 397 U.S. at 669. Indeed, when the government "respects the religious nature of our people and accommodates the public service to their spiritual needs," it "follows the best of our traditions." *Zorach*, 343 U.S. at 314.

The Court's decision in *Marsh* suggests a liberty-focused test for analyzing legislative prayer under the Establishment Clause. It holds that legislative prayer is presumptively permissible unless it is "exploit[ed]" to advance or proselytize on behalf of one religion to the exclusion or detriment of others. *See* 463 U.S. at 794-95. An extreme case, where the government places its "weight behind an obvious effort to proselytize on behalf of a particular religion," could represent "the first step down the road to an establishment of religion." *Allegheny*, 492 U.S. at 661, 664 (Kennedy, J.). But absent an intent to proselytize, when the government's "act of recognition or accommodation is passive and symbolic," "any intan-

gible benefit to religion is unlikely to present a realistic risk of establishment." *Id.* at 662.

The other limitation on government action in this sphere is that it cannot coerce anyone to adopt a particular tenet or belief. But the mere existence of a legislative-prayer opportunity is not coercion. Coercion occurs when an individual is *required* to participate in religious activities. *Cf. Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."). In *Zorach v. Clauson*, for example, this Court held that a release-time program, which permitted students to leave public school to receive religious instruction, did not exert coercive influence on students who chose not to avail themselves of the program. 343 U.S. at 311-14. In upholding the program, the Court emphasized the fact that students were not compelled to attend the religion classes. *Id.* at 311.

By the same token, an individual is not coerced by a civic acknowledgment of religion so long as that individual is not required to participate in it or assent to the views expressed. The Framers' understanding of ceremonial acknowledgments of religion hinged, in part, on an understanding that people should be tolerant of their fellow citizens' differing views. *See Marsh*, 463 U.S. at 792 (noting Samuel Adams's statement that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue" with whom he disagreed (internal quotation marks omitted)). Indeed, the expectation that citizens should be respectful of others' religious beliefs is consistent with this Court's broader First Amendment jurisprudence, which presupposes that citizens will

be exposed to a variety of viewpoints that they may disagree with or even find offensive. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 26 (1971). Because there is no evidence here that the Town compelled anyone to pray or to agree with the viewpoints of the prayer-givers, or that it conditioned any governmental benefits on participation, the mere fact that attendees at meetings might disagree with a prayer is insufficient to constitute an Establishment Clause violation.

"[T]he measure of constitutional adjudication" in the Establishment Clause context "is the ability and willingness to distinguish between real threat and mere shadow." *Schempp*, 374 U.S. at 308 (Goldberg, J., concurring). Absent evidence of exploitation or coercion, however, the risk posed to religious liberty by legislative prayer is no more than "mere shadow." *Id.* The longstanding coexistence of legislative prayer with the twin constitutional mandates of disestablishment and religious liberty "gives abundant assurance that there is no real threat while this Court sits." *Marsh*, 463 U.S. at 795 (internal quotation marks omitted).

C. The "Endorsement" Test Is Contrary To A Proper Understanding Of The Establishment Clause, And At Minimum, Should Not Extend To The Legislative-Prayer Context.

In sharp contrast to *Marsh*'s historical analysis, the "endorsement" test derived from *Lemon* and applied by the court below conflicts with a historical understanding of the Establishment Clause and does more to undermine the protections guaranteed by the Religion Clauses than to safeguard them.

1. Whereas *Marsh*'s approach provides breathing room to prayer-givers to express their religious beliefs consistent with the dictates of their own consciences, the "endorsement" test impermissibly enmeshes the government in disputes over the appropriateness of prayer content. Specifically, the approach adopted by the court of appeals encourages federal, state, and local deliberative public bodies to supervise and censor prayers, in the hope of ensuring that, individually or collectively, they cannot be seen as affiliating the government with a particular religion.

Such censorship, however, is precisely what this Court declared unconstitutional in *Lee*. There, the Court clearly held that the Establishment Clause prohibits school officials from superintending the content of prayers to ensure that they are nonsectarian because it "is a cornerstone principle of [the Court's] Establishment Clause jurisprudence that it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." 505 U.S. at 588 (internal quotation marks omitted). Religious beliefs, and the manner in which they are expressed, are "too precious to be either proscribed or prescribed by the State." *Id.* at 589.

It is impossible to apply the Second Circuit's "endorsement" test without parsing the content of the prayer at issue and making assessments about whether certain prayers are, individually or collectively, too religious. To conclude that the Town had endorsed Christianity, the Second Circuit not only evaluated the challenged prayers' religious language, but also went so far as to dissect the syntax of the

sentences in which those words were used. Pet. App. 23a (noting with disapproval that prayers made use of the "first-person plural[s]" "us," "our," and "we").

Marsh, of course, prohibited such parsing, absent cause for concern that the prayer opportunity had been exploited in furtherance of an impermissible objective. It did so for good reason: Close parsing of prayer language "not only embroils judges in precisely those intrareligious controversies that the Constitution requires [courts] to avoid, but also imposes on [the courts] a task that [they] are incompetent to perform." *Rubin*, 710 F.3d at 1100. As Justice Souter stated in *Lee*, there is hardly a task "less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible," than that of distinguishing "'sectarian' religious practices" from "ecumenical" ones. 505 U.S. at 616-17 (Souter, J., concurring); *see also Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1272 (11th Cir. 2008) (noting that courts "would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions").

The task of distinguishing those isolated words and phrases that could be seen as affiliating the government with religion from those that do not—to say nothing of the difficulty of carrying out that task with respect to months or even years of prayers offered from a variety of different faith perspectives—is daunting. For example, references to "Jesus," "Allah," "Muhammad," and "Buddha" may be easy to categorize. *But see Hinrichs v. Bosma*, No. 05-813, 2005 WL 3544300, at *7 (S.D. Ind. Dec. 28, 2005) (holding that prayers addressed to Allah do not affiliate the government with Islam). Other phrases like "Lord of Lords" and "King of Kings" may provoke dif-

ferences of opinion; one court has designated those as comfortably ecumenical, *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 284 (4th Cir. 2005), but those phrases are used to refer to Jesus in the New Testament. *See Revelation* 19:16. The Second Circuit's "reasonable" observer might conclude that other Judeo-Christian references—such as "Lord" and "Moses"—have the impermissible effect of making adherents to the Hindu or Muslim religion feel like outsiders. *See Joyner*, 653 F.3d at 364 (Niemeyer, J., dissenting).

Respondents are similarly confused as to what prayers would or would not be appropriate, further highlighting the difficulty that would be faced by elected officials and courts forced to administer the "endorsement" test. *See, e.g.*, Pet App. 45a (noting one of the respondent's confusion regarding whether prayer in the name of Allah would be impermissible). Notably, one of the respondents in this case candidly admitted that she could not determine whether various phrases are sufficiently nonsectarian because she is "not . . . a theologian." C.A. App. A769. But neither are the judges who sit on this Nation's courts, and a legal test that requires them to act as if they were cannot be reconciled with this Court's precedents.

The "endorsement" test's task of distinguishing prayers that are "too" religious from those that are sufficiently stripped of religious content casts the Court in the ill-equipped role of "a national theology board." *Allegheny*, 492 U.S. at 678 (Kennedy, J.). Requiring the courts to decide whether a prayer practice is constitutional based on "an unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitu-

tional adjudication." *Id.* at 676. Establishment Clause litigation should not be handled "as if it were a trademark case" with experts testifying whether one religion is more or less like another or witnesses testifying whether they would be offended by four mentions of "Jesus" as opposed to five. *Id.* (internal quotation marks omitted).

2. Application of the "endorsement" test in the legislative-prayer context would also threaten rights protected by the Free Speech and Free Exercise Clauses. The Town's prayer policy offers private individuals a forum in which to open meetings of its legislative body in a manner consistent with their own consciences. The Town's policy is neutral and permits volunteers of any faith tradition, or no faith tradition at all, to deliver an invocation. The Town exercises no editorial control over the invocations. The prayers that resulted from this policy thus reflect the personal beliefs of the prayer-givers, in keeping with the rights protected by the Free Speech and Free Exercise Clauses.

As the Second Circuit made clear below, such facts hardly matter under its "endorsement" test. According to the court of appeals, many of the invocations at issue conveyed a message of endorsement to a "reasonable" observer because they contained explicitly Christian references, used the first-person plural, or invited members of the audience to participate. Pet. App. 20a-23a. But it may often be the case that prayer-givers hold religious views that *require* them to incorporate such references into their prayers. Brief of *Amici Curiae* Dr. Mark L. Bailey *et al.* in Support of the Petition for a Writ of Certiorari at 11, No. 12-696 (Jan. 7, 2013). Thus, the Second Circuit's "endorsement" test gives some prayer-givers

an untenable choice: check their faith at the door and offer only sanitized versions of prayers, or run the risk that their prayers will violate the Establishment Clause.

3. Relatedly, such applications of the "endorsement" test to legislative prayer would also have the effect of promoting a "latent hostility" toward religion. *Allegheny*, 492 U.S. at 657 (Kennedy, J.). As noted above, the Establishment Clause allows the government latitude to acknowledge and accommodate different religious beliefs. Adherence to the Establishment Clause thus does not require the State to engage in viewpoint discrimination among potential prayer-givers. In fact, to do so would "foster[] a pervasive bias or hostility to [some] religion[s], which [would] . . . undermine the very neutrality the Establishment Clause requires." *Rosenberger*, 515 U.S. at 846.

The approach taken by the court of appeals to the "endorsement" test, however, necessarily leads to this sort of discrimination. Under that approach, governments must censor some views in a quixotic quest to strike what might look like a "proper balance" to a supposedly neutral observer.

The "endorsement" test likewise discourages legislative prayer in municipalities where the population is not religiously diverse. In such municipalities, the government may be unable to find a cross-section of volunteer prayer-givers large enough to enable the Second Circuit's "reasonable observer" to conclude that the prayer practice is "substantially neutral amongst creeds." Pet. App. 20a. The standard thus has the effect of making municipalities "think carefully before adopting legislative prayer." Pet. App. 27a. Discouraging religious accommoda-

tion in this way, however, is anathema to this Nation's traditions and signifies a "callous indifference toward religious faith" not required by this Court's cases and our Nation's traditions. *Allegheny*, 492 U.S. at 663-64 (Kennedy, J.). By discouraging historical prayer practices, the "endorsement" test "prefer[s] those who believe in no religion over those who do believe." *Zorach*, 343 U.S. at 314. Nothing in the Constitution requires that outcome.

Moreover, by flipping *Marsh*'s presumption of constitutionality on its head, the "endorsement" test would effectively require courts to serve as "jealous guardians of an absolute 'wall of separation,'" an act which sends a "clear message of disapproval" to the religious. *Allegheny*, 492 U.S. at 657 (Kennedy, J.). By "disabling the government from . . . recognizing our religious heritage," the Second Circuit's application of the "endorsement" test "evince[s] a hostility to religion." *Van Orden*, 545 U.S. at 684 (plurality opinion).

Indeed, the "endorsement" test threatens national traditions of legislative prayer and other civic acknowledgements of religious belief that are rooted in centuries of history. That is because the identity of a prayer-giver or the content of a prayer could cause a putatively "neutral" observer—depending on the characteristics of such an observer—to conclude that the government has affiliated itself with a particular religion.

Under the "endorsement" test as applied by the Second Circuit, invocations delivered by Christian prayer-givers at recent presidential inaugurations would be suspect, *see supra* at 33, as would the prayer practice used by the Nebraska legislature in *Marsh* itself. *See supra* at 26 (discussing dissenting

opinions in *Marsh*); *see also Allegheny*, 492 U.S. at 673 (Kennedy, J.) ("If the intent of the Establishment Clause is to protect individuals from mere feelings of exclusion, then legislative prayer cannot escape invalidation."); *cf. also* Palmer Br. 8-10. Rather than giving "government some latitude in recognizing and accommodating the central role religion plays in our society," *Allegheny*, 492 U.S. at 657 (Kennedy, J.), the Second Circuit's test encourages government to minimize religion's societal role. That is not consistent with our Nation's traditions or a proper understanding of the Religion Clauses.

4. Application of the "endorsement" test to legislative prayer also has the unfortunate, added side-effect of providing a "heckler's veto" to individuals who may disagree with the personal religious expression of a legislative prayer-giver. By focusing on whether the prayer practice "'sends a message to nonadherents that they are outsiders [and] not full members of the political community,'" *Allegheny*, 492 U.S. at 595 (Blackmun, J.) (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)), the endorsement approach empowers nonreligious people to challenge legislative-prayer practices simply on the ground that they disagree with what they see as the prayers' messages. But this Court has specifically "decline[d] to employ Establishment Clause jurisprudence using a modified heckler's veto" based on the perceptions of certain members of an audience. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001).

The heckler's veto is the wrong model for Establishment Clause jurisprudence because the Clause is not aimed at protecting individuals from feeling offended. *See Lee*, 505 U.S. at 597 ("People may take offense at all manner of religious as well as nonreli-

gious messages, but offense alone does not in every case show a violation."). Rather, the core purpose of the Clause is to prevent citizens from being coerced into religious participation. *See supra* Section II.B. Legislative prayer, like speech in general, "is not coercive" because "the listener may do as he likes." *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting). No one is compelled to deliver or join in the invocations offered at the Town board meetings. And anyone who disagrees with the message conveyed by the prayers is free to ignore the prayer-giver, sit silently, or leave the room, just as he is free to do when he disagrees with any other form of speech uttered at a session of a public deliberative body. *See Allegheny*, 492 U.S. at 664 (Kennedy, J.). Fears that a handful of individuals may hear legislative prayers offered voluntarily by private citizens and feel like outsiders are not sufficient justifications to trump the Court's historical understanding of the Establishment Clause and the unbroken tradition of legislative prayer.

* * *

The problems associated with the "endorsement" test are not limited to the legislative-prayer context. Rather, this Court has invoked the test to invalidate other public acknowledgments or accommodations of religious belief without any showing that the challenged conduct established religion or coerced adherence to any particular faith. *See, e.g., Allegheny*, 492 U.S. at 601 (crèche display at county courthouse); *McCreary*, 545 U.S. at 869 (Ten Commandments display). Whenever it is used, the "endorsement" test subjects public acknowledgements and accommodations of citizens' sincerely held religious beliefs to

oversight by an ahistorical, judicially created abstraction—the "reasonable observer."

The construct of the "reasonable observer" is fatally flawed. He or she is a "purely fictitious character" who seems to "perceive precisely as much, and only as much, as its author wants it to perceive." Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266, 292 (1987). As a result, "the endorsement test is . . no test at all, but merely a label for the judge's largely subjective impressions[,] . . . obscuring intuitive judgments made from the individual judge's own personal perspective." Paulsen, *supra*, at 815-16. Not surprisingly, the "endorsement" test has produced irreconcilable results in this Court and the lower courts. *See generally Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011) (Thomas, J., dissenting from the denial of certiorari) (collecting cases).

Far from being a welcome "refine[ment]" of this Court's much-criticized *Lemon* test, *Allegheny*, 492 U.S. at 592, the "endorsement" test inherited *Lemon*'s weaknesses: Both tests are incapable of consistent application, enmesh the judiciary in making doctrinal judgments best left to particular individuals and religious communities, and ultimately threaten religious pluralism and free expression. *See Am. Atheists*, 132 S. Ct. at 14-23 (Thomas, J.); *Lamb's Chapel*, 508 U.S. at 398-401 (Scalia, J., concurring in the judgment), *Edwards*, 482 U.S. at 636-40 (Scalia, J., dissenting); *Wallace*, 472 U.S. at 108-114 (Rehnquist, J., dissenting).[10] It also makes it

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[10] Notably, only eight years ago, Justice Scalia observed that a "majority of the Justices on the . . . Court" at that time had "re-

impossible for government officials to know, *ex ante*, whether their conduct and policies comport with the Constitution. "It is irresponsible to make the Nation's legislators walk this minefield." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 768-69 n.3 (1995) (plurality opinion). *Lemon* and its endorsement-test offspring should be replaced with an approach that is more faithful to the original meaning of the Religion Clauses and respectful of our Nation's religious heritage. At minimum, the test is an inappropriate standard for analyzing the constitutionality of legislative-prayer practices.

III. The Town's Neutral Policy Permitting Volunteer Prayer-Givers Of Any Or No Faith To Deliver Uncensored Invocations Is Constitutional Under Any Test.

This Court's decision in *Marsh*, informed by a historical understanding of the Religion Clauses, provides the proper lens through which to evaluate and uphold the Town's legislative-prayer practice. But that practice, which permits citizens from any or no faith tradition to provide an uncensored invocation, passes constitutional muster under any standard this Court might apply.

1. Even leaving aside the fatal shortcomings of the "endorsement" test described above, this Court's precedents make clear that, at minimum, "the reasonable observer in the 'endorsement' inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place]." *Good News Club*, 533 U.S. at 119 (in-

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pudiated the brain-spun '*Lemon* test.'" *McCreary*, 545 U.S. at 890 (Scalia, J., dissenting).

ternal quotation marks omitted) (alteration in original); *see also McCreary*, 545 U.S. at 863; *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment).

Any well-informed, impartial observer would deem the Town's practice of opening sessions with an invocation permissible for at least two reasons. First, the observer would be acquainted with the Nation's centuries-long history of legislative prayer, and would conclude that the historical evidence "suggest[s] more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the [practice] as amounting, in any significantly detrimental way, to a government effort to" establish religion. *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in the judgment); *see also id.* at 699 (noting, per *Marsh*, "the Establishment Clause's tolerance . . . of the prayers that open legislative meetings"). For this reason, Justice O'Connor recognized in her concurring opinion in *Lynch* that "governmental 'acknowledgments' of religion [such] as legislative prayers of the type approved in *Marsh*" do not amount to "endorsement" of religion. *Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring). In contrast, the amnesiac observer employed by the Second Circuit ignored this history in declaring the Town's practice an impermissible endorsement.

Second, any well-informed reasonable observer would be aware that the Town's policy for selecting prayer-givers is facially neutral and that there is no evidence the Town exploited the prayer opportunity to convey a particular message or advance or proselytize for a particular faith. Pet. App. 20a, 22a. Neutral policies of this sort do not amount to an "en-

dorsement" of religion. That is true even if neutral outcomes do not result. *See Zelman*, 536 U.S. at 658 (declining to "attach constitutional significance to the fact that 96% of scholarship recipients . . . enrolled in religious schools"). No truly reasonable and fully informed observer could conclude that legislative prayers offered by private volunteers from multiple faith traditions according to a facially neutral policy affiliated the Town with or endorsed any particular religion.

2. The Town's practice would also be constitutional if this Court chose to evaluate it under its limited-public forum jurisprudence, which affords protection to private individuals who express their views in a forum created by the government for a particular purpose that is equally open to all citizens.

Marsh confirms that the government does not take even "a step toward establishment" when it employs a government official to invoke Divine guidance on a deliberative public body, even when the prayers are often explicitly Christian. 463 U.S. at 792, 793 n.14. It thus follows that *Marsh* permits government to open a forum that grants private citizens the opportunity to open a session of their legislative body with an invocation consistent with their own personal religious beliefs.

In a limited public forum, the government may confine acceptable speech to certain subjects and speakers, *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 & n.7 (1983), and can restrict the content of the speech to certain topics so long as the restrictions are reasonably related to the purpose of the forum and viewpoint neutral. *See Good News Club*, 533 U.S. at 106-07. Here, the

Town's forum for voluntary invocations meets the parameters of this test.

Under the Town's practice, unpaid private volunteers from any or no religion are permitted to deliver an opening statement according to the dictates of their own consciences and free from any form of governmental guidance or censorship. The Town neither controlled nor "effectively controlled" the viewpoint of the citizens' speech. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005). Nor is there any indication, for example, that the Town has "enlist[ed] private entities to convey its own message." *Rosenberger*, 515 U.S. at 833. Rather, the Town simply provided a neutral opportunity for its citizens to speak, and did not "promote any of the particular ideas aired." *Widmar*, 454 U.S. at 271-72 n.10. In fact, because private, volunteer citizens with no connection to the Town's government delivered invocations, any religious content resulted from the speakers' own choices and could not have violated the Establishment Clause. *See Rosenberger*, 515 U.S. at 846; *cf. Mueller v. Allen*, 463 U.S. 388, 399 (1983) ("no imprimatur of state approval" of religion where religious choice is made by private individuals (internal quotation marks omitted)).

The Town could not have censored its citizens' views based on their religious content without engaging in impermissible viewpoint discrimination. *Cf. Good News Club*, 533 U.S. at 119; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). Rather, once the Town established an opportunity for private citizens to open the legislative session and allowed all to participate, the freely held views of its citizens are entitled to constitutional protection and cannot be disturbed.

IV. The Nation's Longstanding And Widely Practiced Tradition Of Legislative Prayer Is Worthy Of Protection As A Permissible Accommodation Of Religious Beliefs.

Legislative prayer has been a fixture of this Nation's democracy since the Founding. Deliberative public bodies at every level of government—from the United States Congress to local municipalities—open their sessions with prayer. Every state contains at least one legislative chamber that opens its sessions with an invocation. National Conference of State Legislatures, Prayer Practices, *in Inside the Legislative Process*, at 5-148 (2002), *available at* http://www.ncsl.org/documents/legismgt/ILP/02Tab5Pt7.pdf (listing all states except for New York and South Carolina, neither of which responded to the survey); *see also* N.Y. Assembly R. VI, § 2(b); N.Y. Sen. R. X, § 4(a); S.C. Sen. R. 32A.[11]

In reliance on this Court's precedents and more than 200 years of history, deliberative public bodies are permitted to carry forward a rich cultural tradition that both predates the Founding and that acknowledges the solemnity of their proceedings and the various religious heritages of their particular constituencies. For example, some legislative bodies employ paid chaplains, while others rely on visiting

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[11] It is worth noting, however, that the Hawaii Senate recently ended its practice of legislative prayer due to threats of litigation. *See* Kerry Picket, *Hawaii Senate Becomes First Legislative Body To End Daily Prayer*, Wash. Times Water Cooler Blog (Jan. 21, 2011, 4:44 PM), http://www.washingtontimes.com/blog/watercooler/2011/jan/21/hawaii-senate-becomes-first-legislative-body-end-d/.

chaplains or volunteer prayer-givers.[12] Some provide guidelines for delivering opening invocations; others do not.[13] Some review prayers before they are presented, while others do not.[14] So long as the legislative bodies do not exploit the prayer opportunity to proselytize or to advance or disparage any particular religion or exercise editorial control over prayer content, all of these prayer practices are permissible under *Marsh*.

If respondents' brand of the "endorsement" test were applied to evaluate the constitutionality of invocations offered at legislative sessions, Congress's legislative-prayer practice as well as other longstanding practices at the state and municipal levels would be cast into serious doubt. That is unfortunate, because the tradition of legislative prayer is well worth preserving. The Town's prayer practice (like those employed by deliberative bodies nationwide) provides prayer-givers with the opportunity to offer an invocation according to the dictates of their own consciences, and for citizens to take comfort that their government is operating "with a firm reliance on the protection of divine Providence." The Declaration of Independence para. 5 (U.S. 1776). Such prac-

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[12] Like the Town, legislatures in thirty-seven States have not designated a permanent chaplain to deliver their opening invocation. *See* Prayer Practices, *supra*, at 5-158. Legislatures in twelve States do not rotate visiting chaplains among religions. *Id.* at 5-171.

[13] Legislatures in thirty States do not provide prayer-givers with guidelines for the delivery of an opening prayer. *Id.* at 5-153.

[14] Of the states that responded to the National Council of State Legislature's survey, only Florida and Ohio review prayers before they are given. *Id.* at 5-157.

tices also have the beneficial effects of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring).

The Second Circuit's application of the "endorsement" test, by contrast, threatens to stifle religious expression and communicate a message to people in many American communities that the expression of sincerely held religious beliefs is unwelcome and unacceptable in the public square. Indeed, the court of appeals candidly acknowledged that application of the "endorsement" test in the context of legislative prayer "may well prompt municipalities"—and, presumably, states and the federal government—"to pause and think carefully" about the practical vitality of operating a constitutional legislative-prayer practice. Pet. App. 27a.

Such a restrictive test has no basis in the text, structure, history, or purposes undergirding the Establishment Clause, and borders on a "callous indifference," *Lynch*, 465 U.S. at 673, or a "latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious." *Allegheny*, 492 U.S. at 657 (Kennedy, J.). The ironic, and tragic, result is that application of the "endorsement" test would "promote the kind of social conflict the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment).

That should not be: As this Court has recognized, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313. Therefore, "[g]overnment policies of accommo-

dation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage." *Allegheny*, 492 U.S. at 657 (Kennedy, J.). Legislative bodies throughout this country should have the freedom to acknowledge and accommodate the religious heritage of their citizens by adopting a practice substantially similar to one adopted by the very people who drafted the Establishment Clause, thereby participating in this Nation's "unbroken history" of legislative prayer. *Marsh*, 463 U.S. at 792.

CONCLUSION

This Court's historical analysis in *Marsh* affirms the important role of public prayer from the very founding of this Nation. Deliberative public bodies at every level of government—from the United States Congress to the Town of Greece—have adopted legislative-prayer practices and solemnize their deliberative meetings with invocations. This widespread practice reflects the deeply embedded historical tradition of our Nation. Under *Marsh*, and in keeping with the proper understanding of the Constitution, legislative-prayer practices like those at issue here do not run afoul of the Establishment Clause. The judgment of the court of appeals should be reversed.

Respectfully submitted.

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July 26, 2013

RESPONDENT'S BRIEF

No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTION PRESENTED

Whether the Establishment Clause prohibits the presentation of sectarian prayers at local-government meetings in circumstances where both adults and children face pressure to attend the meetings and participate in the prayers.

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INTRODUCTION

This case is not about the ability of legislators to acknowledge God or seek divine guidance. It is about the right of citizens to participate in local government without being required to participate in sectarian prayers.

Petitioner and the United States insist that this case is controlled by *Marsh v. Chambers*, 463 U.S. 783 (1983). But the prayers before the Greece Town Board differ in fundamental ways from the prayers before a state legislature. The prayers in Greece are directed at citizens who have little choice but to attend Board meetings—to seek zoning changes, business permits, or Board action on local issues; to take the oath of office; or to receive public honors. The prayers, moreover, are not inclusive: the vast majority have been explicitly Christian; they are sectarian, in that they specify details on which believers in God are known to disagree. Citizens face undeniable pressure to participate in these prayers, presenting religious minorities with the untenable choice of betraying their conscience or visibly dissenting from majoritarian religious norms.

It is fundamental that government may not press citizens to participate in religious exercises. And whether or not Congress may sponsor sectarian prayers for those of its members who choose to participate—a question that *Marsh* did not decide—government may not direct explicitly sectarian or proselytizing messages at the broader citizenry. The practice in Greece violates both of these principles.

STATEMENT

A. Board Meetings

The Greece Town Board is the "most important part of Town government." Town Board, http://greeceny.gov/planning/townboard.[1] It exercises legislative, executive, and administrative powers. *See* State of N.Y., Dep't of State, *Local Government Handbook* 61-62, 66 (6th ed. 2009), *available at* http://www.dos.ny.gov/lg/publications/Local_Government_Handbook.pdf.

At its monthly public meetings, Board members, the Town Clerk, the Chief of Police, and Directors of seven other departments sit on a dais. *See* Exhs. 701-807, 811-29; C.A. App. A863.[2] Hardly anyone remains anonymous. Average attendance is modest: one witness guessed ten; another, less than ten. C.A. App. A777, A929. One official testified that in her seven years of regular attendance (C.A. App. A926-27), only one or two meetings drew more than fifty people (C.A. App. A930). Board members routinely engage citizens in

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[1] All websites cited in this brief were last visited on September 15, 2013.

[2] Exhibits 701-807 and 811-29—DVDs of Board meetings from January 1999 through June 2010—accompanied plaintiffs' summary-judgment briefing before the district court. *See* Dist. Ct. Dkt. Nos. 32 (Exhs. 701-807); 34 (Exhs. 811-14); 38 (Exhs. 815-17); 5/27/09 unnumbered docket entry (Exh. 818); 46 (Exhs. 819-21); 9/10/09 unnumbered docket entry (Exh. 822); 51 (Exh. 823); 53 (Exh. 824); and 55 (Exhs. 825-29); *see also* Dkt. Nos. 31, 39 (accepting manual filing of DVDs containing these exhibits).

conversation. *See, e.g.*, http://tinyurl.com/public-forums; http://tinyurl.com/civics-students.[3]

Both adults and children attend meetings, not just as observers, but as participants—often at the Board's invitation or direction. At each meeting, the Board conducts a public forum in which citizens raise concerns and complaints. At almost all meetings, the Board also conducts public hearings at which applicants request zoning changes or special-use permits that the Board has discretion to grant, modify, or deny.[4] Citizens also attend to receive awards for civic accomplishments, to be sworn in as municipal employees, and to fulfill a high-school civics requirement.

1. Award ceremonies

Approximately 40% of Board meetings include an award ceremony. *See* note 4, *supra*. These ceremonies occur immediately after the prayer. *See, e.g.*, C.A. App. A345, A351, A401. Board members and department heads join the honorees at the front of the room. Supervisor Auberger makes remarks and reads a proclamation; the honorees may make a statement or

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[3] This link, and the other video links in this brief, are compilations taken from DVDs of Town Board meetings that were included as exhibits to Plaintiffs' summary-judgment briefing below. *See* note 2, *supra*. To see unedited video of any single item within a compilation, *see* http://www.greecevgalloway.net. To see any meeting in full, view the corresponding DVD.

[4] *See* Minutes & Agendas, C.A. App. A312-A446, A448-A570, A1058-60, A1082, A1092-94, A1102, A1108, A1118, A1120-25.

presentation; and the ceremony concludes with applause. *See* http://tinyurl.com/adults-rec.

For example, a man was honored for maintaining a home that received the Town's first local-landmark designation (Exh. 706); a women's choir was honored for its achievements and sang for the audience (Exh. 716); and eight individuals were honored for founding the local little league (Exh. 721).

2. Oaths of office

Many Board meetings include oath ceremonies for new police officers or other new Town employees. *E.g.*, C.A. App. A345; Exhs. 722 (Fire Marshal's ceremony), 774, 829 (police officers' ceremonies). Oath ceremonies follow award ceremonies (*see, e.g.*, C.A. App. A345, A351, A365); if there is no award ceremony, the oath ceremony immediately follows the prayer (*see, e.g.*, C.A. App. A375, A382, A385, A413, A418). Board meetings are the only venue for these ceremonies. C.A. App. A780-81.

New police officers are typically joined by police officials, other officers, and family members, including children. *See, e.g.*, Exhs. 706, 709, 722, 751, 811, 827, 829; *see also* http://tinyurl.com/oaths-office. The Chief of Police explained the ceremonies' importance:

> You know we make a big deal out of swearing the police officers in and making a big public display, but it's very important to us. These are the officers that citizens are going to see out there every day—risk their lives, do the job.

Exh. 759.

3. Petitioning the Board

Citizens address the Board in two parts of its meetings: the public forum and public hearings. Citizens request official Board action; they petition for redress of grievances. The meetings are a citizen's only opportunity to address the Board as a body. C.A. App. A779.

a. Public Forum. In the public forum, citizens address the Board on a wide range of municipal issues over which the Board has authority. They must state their name and address. *See* Exhs. 701-807, 811-29. They ask the Board to act on matters that directly affect their lives. The parents of a child with Down syndrome argued in support of a proposed group home (Exh. 705); a wheelchair-bound man asked for better accommodations for the disabled (Exh. 718); a citizen opposed the construction of a Wal-Mart (Exh. 794); and citizens asked the Board to address criminal activity in their neighborhoods (Exh. 732) and to ameliorate traffic congestion (Exh. 755). Sometimes these comments yield immediate results, with Supervisor Auberger promising to address the problem. *See, e.g.*, Exhs. 718, 732, 755; http://tinyurl.com/public-forums.

When there is no award or oath ceremony, the public forum immediately follows the prayer; if no one steps to the microphone, the forum closes in under a minute. *See, e.g.*, Exhs. 731, 748, 757, 758, 773, 815, 823.

b. Public Hearings. Approximately 90% of Board meetings include at least one public hearing. *See* note 4, *supra*. A citizen seeking to rezone property or to obtain a special-use permit to open a small business

must appear before the Board for a hearing. *See* Town of Greece, *Instructions for Special-Use Permits*, http://greeceny.gov/planning/townboard; C.A. App. A788. All owners of property within 500 feet of the applicant's property are notified of the hearing. Town of Greece Code § 211-61(B)(2), *available at* http://tinyurl.com/greece-code. The Board may approve, modify, or deny applications in its broad discretion. *Id.*; *id.* § 211-60(A)(2). Many kinds of businesses are subject to these rules. *See, e.g.*, *id.* § 211-11(C)(1), 13(C), 17(A)(3)(a).

At the hearing, the applicant presents a summary of his request; the Board takes comments from supporters and opponents; and Board members question the applicant about the proposed business and about concerns that other citizens have raised. *See* Exhs. 702, 733, 779; http://tinyurl.com/public-hrg.

Hearings typically begin thirty minutes after the meeting starts. *E.g.*, C.A. App. A1118, A1120-25. If the Board has not completed its other agenda items, it interrupts the meeting for the hearing. *See, e.g.*, Exhs. 706, 735, 742, 816.

4. Children's participation

High-school students attend Board meetings to receive up to three hours' credit toward a participation-in-government requirement. C.A. App. A282-A304, A779, A929. They must obtain an official's signature verifying their attendance and write a summary of the meeting for their teacher. C.A. App. A294, A779. Supervisor Auberger and others on the dais regularly instruct these students about the proceedings. *See, e.g.*, Exhs. 739, 812, 827; http://tinyurl.com/civics-students.

The Board routinely gives awards to groups of schoolchildren, who are joined by coaches, teachers, or other authority figures. The Board honored a squad of middle-school cheerleaders, who performed a routine for the audience. Exh. 726. It recognized a successful girls' soccer team, bringing its coach to tears. Exh. 778. A boys' baseball team was honored for representing Greece in a tournament. Exh. 711; *see also, e.g.*, C.A. App. A445 ("students from Greece Athena High School"), A345 (soccer team), A517 (tennis team); http://tinyurl.com/child-grp.

Individual children have been honored for, among other things, academic achievement (Exhs. 721, 724), volunteerism (Exh. 734), and saving people's lives (Exhs. 704, 706, 709, 737). *See also, e.g.*, Exh. 702 (boy honored for calling attention to a traffic hazard); C.A. App. A355 (children inducted into "Greece Youth Hall of Fame"); http://tinyurl.com/student-rec.

The Board has also honored youths from an Explorer Post sponsored by the Greece Police Department; a police-department official described their accomplishments. *See* Exhs. 741, 744; http://tinyurl.com/explorer-rec.[5]

Children also petition the Board in the public forum. A 14-year-old argued against a proposed athletic complex (Exh. 740); and a group of

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[5] Explorer Posts comprise individuals aged 14-20 who participate in work-site career-learning opportunities; they are often sponsored by government agencies. *See Real-World Career Experiences Exploring*, http://exploring.learningforlife.org; *see also What Is Exploring*, http://exploring.learningforlife.org/about-us/what-is.

students—accompanied by teachers and school administrators—thanked the Board for addressing traffic-safety issues at their school (Exh. 702).

Children are regularly invited to lead the Pledge of Allegiance. *See, e.g.*, Exhs. 712, 741, 796. Sometimes, the same children lead the Pledge immediately before the prayer and are honored immediately after. *See* http://tinyurl.com/before-after-prayer. At one of these meetings, a children's group led the Pledge from the front row; as they took their seats, the guest chaplain was summoned to lead the prayer; and as the chaplain walked away from the podium, Supervisor Auberger addressed the children. Exh. 796. All of this happened in a matter of minutes, with a row of police officers at the back of the room awaiting an oath ceremony. *Id.*

B. Petitioner's Sectarian Prayers

Historically, the Town opened its Board meetings with a moment of silence. Pet. App. 3a. When Supervisor Auberger was elected in 1999, he began opening meetings with a prayer instead. *Id.*; C.A. App. A792. Initially, Auberger himself delivered the prayers. C.A. App. A596-98. After a few months, the Board started inviting a "chaplain of the month" to do so. Pet. App. 3a-4a.

Supervisor Auberger summons the guest chaplain to deliver "our prayer" (or "our moment of prayer") from a podium that bears the Town seal and sits just below the dais. *See generally* J.A. 27a-143a. When delivering the prayer, the chaplain faces the assembled

citizens, his back to the Board. *See* Exhs. 701-807, 811-29.[6]

Petitioner gives its guest chaplains no guidelines to discourage sectarian, proselytizing, or disparaging prayers. *See* Pet. App. 4a, 22a. When asked at his deposition whether the Town would permit, for example, prayers lamenting "the evils of homosexuality" or imploring "our white Lord Jesus, to grant peace to the white residents of Greece but not the blacks or Jews or homosexuals or other perverts," Supervisor Auberger said over and over that "We do not control the content of the prayer." C.A. App. A819-21.

Approximately two-thirds of petitioner's prayers have referenced "Jesus," "Christ," "Your Son," or the "Holy Spirit." *See* Pet. App. 7a; J.A. 27a-143a. In the eighteen months before the record closed, 85% contained such references. J.A. 129a-43a. Even in 2008—the year this lawsuit was filed, and the only year to include non-Christian chaplains (Pet. App. 4a-5a)—a majority of prayers were explicitly Christian. *See* J.A. 109a-15a, 117a, 124a-28a.

Many prayers have included extended statements of Christian doctrine. For example, one guest chaplain stated:

> We look with anticipation to the celebration of Holy Week and Easter. It is in the solemn

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[6] An employee later turns the podium around, so that public-forum speakers—unlike the guest chaplains—address the Board rather than the audience. *See, e.g.*, Exhs. 770, 773, 774; http://tinyurl.com/public-forums.

> events of next week that we find the very heart and center of our Christian faith. We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength, vitality, and confidence from his resurrection at Easter. Jesus Christ, who took away the sins of the world, destroyed our death, through his dying and in his rising, he has restored our life. Blessed are you, who has raised up the Lord Jesus, you who will raise us, in our turn, and put us by His side.

J.A. 88a-89a, http://tinyurl.com/exh773. On another occasion, this chaplain spoke of Spring as "an expressive symbol of the new life of the risen Christ," and said that the "Holy Spirit continues to be the inspiration and the source of strength and virtue, which we all need in the world of today." J.A. 134a, http://tinyurl.com/exh819. Another chaplain spoke of "the plan of redemption that is fulfilled in Jesus Christ" (J.A. 99a, http://tinyurl.com/exh785), and on another occasion,"the life and death, resurrection and ascension of the Savior Jesus Christ" (J.A. 129a, http://tinyurl.com/exh815). Other guest chaplains read and explained biblical passages, and extolled God's having sent his son Jesus Christ into the world. J.A. 94a, http://tinyurl.com/exh780; J.A. 113a-14a, http://tinyurl.com/exh802; J.A. 97a, http://tinyurl.com/exh783.

Guest chaplains regularly assume that everyone present is Christian. They speak of "our Christian faith" (J.A. 88a), "us as Christian people" (J.A. 59a), and "the role of the Holy Spirit in our lives" (J.A. 56a, 61a, 89a). They speak for the group: "We ask it all in

the name of Jesus Christ, our savior" (J.A. 69a), and "We look with anticipation to the celebration of Christmas and the birth of Jesus Christ" (J.A. 117a, 122a). They pray for "the members of our community who come here to speak before the board" (J.A. 45a), and "everybody that will partake in this gathering" (J.A. 143a). Sometimes they pray by name for citizens scheduled to participate in the meeting. *See* J.A. 40a, C.A. App. A464; J.A. 45a, C.A. App. A469; J.A. 108a, C.A. App. A542.

Many chaplains request that all present "join" in the prayer. Pet. App. 6a, 23a; *e.g.*, J.A. 36a ("Let's join our hearts together right now, and ask the Lord's blessing on our time together here tonight. Father, in Jesus' name we just invite you * * *."); *see also* J.A. 60a, 63a, 73a, 78a, 135a. One chaplain called on everyone to recite the "Our Father" together. J.A. 56a, http://tinyurl.com/exh734. Others call for citizen participation in ways that highlight nonparticipants, asking citizens to stand or "bow our heads out of respect to God." J.A. 72a; *see also* Pet. App. 23a. Board members have made similar requests. *See* J.A. 57a, 66a-67a. Board members routinely bow their heads, stand, respond "Amen," or make the sign of the cross. Pet. App. 6a, 23a. The audience does the same. Pet. App. 6a.

Chaplains have disparaged those who question petitioner's prayer practice, or who are not "God-fearing." *E.g.*, J.A. 79a. One said, "despite the objections of some, they are in the minority and they are ignorant of the history of our country." J.A. 108a. Another chaplain thanked the Board for opening with prayer "[o]n behalf of all God-fearing people in this

town." J.A. 137a. Still another impugned towns that lack "God-fearing" leaders. J.A. 79a.

In addition to thanking guests for serving as the Town's "chaplain of the month," Auberger has thanked them for serving as the chaplain for the Greece Police Department. J.A. 32a; *see also* J.A. 35a (describing functions of police-department chaplain); *see generally* J.A. 29a-78a. Auberger's gratitude has been extended on behalf of both the Board and Town residents. *See, e.g.*, J.A. 36a-37a, 40a, 51a, 73a. And he has at times presented guest chaplains with a plaque to commemorate their service. Pet. App. 4a.

C. The Town's Haphazard Selection Process

1. Before the threat of litigation

For nine years, from the beginning of petitioner's prayer practice until just before this lawsuit was filed in February 2008 (J.A. 10a (Dkt. No. 1)), every guest chaplain, and every person on petitioner's lists of potential chaplains, was a Christian clergyman. Pet. App. 4a-5a.

Employees assigned to schedule chaplains were told to "call a pastor" (C.A. App. A177), but received no other guidance (C.A. App. A903-04). They compiled multiple, overlapping, and disorganized lists of clergy. C.A. App. A142-77; Pet. App. 31a-41a. They called pastors off these lists "in no particular order, in no particular fashion" (C.A. App. A991), with no "rhyme or reason" (C.A. App. A972). *See also* C.A. App. A904, A906. When the scheduler had trouble finding someone or when someone canceled, she turned to a handful of reliable "standby" pastors who would "come in a

heartbeat"; this happened "a lot." C.A. App. A905; *see also* Pet. App. 37a-38a. Some pastors appeared eight, nine, or fourteen times; others, only once. Pet. App. 33a, 35a, 41a.

2. After the threat of litigation

In 2007, respondents' counsel wrote to question petitioner's prayer practice. J.A. 21a-25a. As litigation approached and then ensued, petitioner found three non-Christians, who delivered a total of four prayers. Pet. App. 4a-5a.

A Jewish layman, who was a Board member's friend (*see* J.A. 114a-15a), was asked to deliver the prayer in January 2008. Pet. App. 4a-5a; J.A. 109a-10a; C.A. App. A844-45. After the lawsuit was filed in February, a Wiccan Priestess read press reports and asked to deliver a prayer (C.A. App. A166, A855-58); she did so in April (J.A. 112a). In July, the Jewish layman delivered a second prayer. J.A. 114a-15a. The Town added the local Baha'i Temple to its list on its own initiative, but only after the lawsuit was filed. Pet. App. 5a. The Temple's leader gave the prayer in December. J.A. 127a-28a. These three individuals are the only non-Christians ever to deliver a prayer—and they all did so in 2008, the year that the litigation began. Pet. App. 4a-5a.

After discovery closed in October 2008 (J.A. 11a (Dkt. No. 26)), the prayer scheduler promised in a January 2009 summary-judgment filing that she would start a rotation system: "I will start from the top, and work my way down to the bottom of the list. Where I stop one month, I will start the following month * * *." C.A. App. A829. Of the fifty-four names on the list

accompanying her filing, the only non-Christians were the three who prayed in 2008. C.A. App. A831-32.

Still later, petitioner filed a chaplain list with almost forty new entries, including a local Buddhist Temple and over a dozen Jewish groups—several of which appear to be cemeteries. *Compare* C.A. App. A831-32, *with* C.A. App. A1053-55. Many of the new entries shared the same address, and almost all lacked phone numbers. C.A. App. A1053-55.

These alleged reforms led to nothing. From January 2009 until the record closed in June 2010, no non-Christian gave the prayer. Pet. App. 5a. Nor did the Town call chaplains in rotation. Two Christian pastors made repeat appearances (J.A. 137a, 139a, 142a, 143a), and chaplains did not appear in anything resembling the order in which they appeared on the Town's lists. *Compare* J.A. 129a-43a, *with* C.A. App. A831-32 *and* A1053-55.

Petitioner says that "any citizen" can volunteer to deliver a prayer. Pet. Br. 7. But petitioner never publicized any such opportunity. Pet. App. 30a. Even when litigation was imminent, Supervisor Auberger and the Town Attorney said that the practice was to have a prayer by "a member of the local clergy" (J.A. 22a) and "our invited clergy" (J.A. 24a).

D. The Plaintiffs

Respondents are a Jew and an atheist who have regularly attended Board meetings. Pet. App. 7a-8a, 29a. They have done so to address specific local issues—such as the public-access cable channel and the use of local parks—and have spoken during the public-forum period about these issues and about the

prayer practice. C.A. App. A189-90, A195-96, A574-76, A746, A764, A1063, A1067-69, A1076, A1085.

They have felt coerced by guest chaplains' requests to participate in the prayers, and they have felt isolated, embarrassed, and humiliated when they have declined to participate while those around them stared. C.A. App. A1067-69, A1085-86. When respondents complained to Town officials in September 2007, they were told either to leave the room or to ignore the prayers. C.A. App. A190, A196. The following month, the guest chaplain said that they were "in the minority and they [we]re ignorant of the history of our country." J.A. 108a.

E. Proceedings Below

The district court held, on cross-motions for summary judgment, that respondents had standing (Pet. App. 66a-68a); that respondents had not proven intentional discrimination against non-Christians in selecting chaplains (Pet. App. 69a-78a); and that petitioner's prayer practice did not violate the Establishment Clause (Pet. App. 126a-29a). Respondents appealed the last ruling (Pet. App. 10a), arguing that the prayers and chaplains were overwhelmingly Christian (Appellants' C.A. Br. 2, 5-11, 18, 25-37), and that adults and children were pressured to participate in the prayers (*id.* at 2, 11-15, 18-19, 39-43).

After considering the "totality of the circumstances" (Pet. App. 19a), a unanimous panel of the Second Circuit held that petitioner had affiliated itself with a single religion, in violation of *Marsh*. Pet. App. 1a-27a.

The court observed that "[w]e need not 'embark on a sensitive evaluation' or 'parse the content of a particular prayer,' * * * to recognize that most of the prayers at issue here contained uniquely Christian references." Pet. App. 20a (quoting *Marsh*, 463 U.S. at 795). "[T]he town did not explain that it intended the prayers to solemnize Board meetings, rather than to affiliate the town with any particular creed," and did not request that chaplains avoid proselytizing or disparaging remarks. Pet. App. 22a. Petitioner's litigating position—that it would accept volunteers of any faith—was undercut by its failure ever to announce such a policy and by its reliance on "a cadre of recurrent volunteers." Pet. App. 20a & n.5. Its process "virtually ensured a Christian viewpoint." Pet. App. 19a. Under those circumstances, "the rare handful of cases, over the course of a decade, in which individuals from other faiths delivered the invocation cannot overcome the impression, created by the steady drumbeat of often specifically sectarian Christian prayers, that the town's prayer practice associated the town with the Christian religion." Pet. App. 22a.

The court also considered the context of the prayers, noting Board members' participation, the chaplains' delivery of prayers on everyone's behalf, and the requests for audience participation—all of which "placed audience members who are nonreligious or adherents of non-Christian religion in the awkward position of either participating in prayers invoking beliefs they did not share or appearing to show disrespect for the invocation." Pet. App. 23a. The court concluded that petitioner "conveys the impression that town officials themselves identify with the sectarian

prayers and that residents in attendance are expected to participate in them." Pet. App. 26a.

The court remanded to allow the district court, "with the assistance of the parties, to craft appropriate relief." Pet. App. 27a.

SUMMARY OF ARGUMENT

I. Petitioner's prayer practice is unconstitutional for two independent but mutually reinforcing reasons. It puts coercive pressure on citizens to participate in the prayers, and those prayers are sectarian rather than inclusive.

"It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Petitioner's practice violates this basic guarantee. Citizens attend meetings not as observers, but as participants. Some must attend to request special-use or rezoning permits or Board action on other issues; others attend to be sworn in to office, to be publicly honored, or to fulfill an educational requirement. Citizens' attendance is not voluntary in any meaningful sense.

The Town asks clergy to deliver prayers on its behalf, but it does so without attending to any of its Establishment Clause responsibilities. It does not ask its guest chaplains to refrain from asking citizens to join in the prayers, and it takes no steps to ameliorate the coercion faced by those in attendance. Religious minorities are pressed either to feign participation in an act of worship that violates their own beliefs, or to

publicly display their dissent from majoritarian religious norms.

Petitioner does not ask its guest chaplains to avoid proselytizing or disparaging remarks, let alone to pray in an inclusive manner. With no instruction to do otherwise, petitioner's guest chaplains routinely offer prayers acceptable only to Christians.

Petitioner's practice cannot find refuge in a tradition of governmental religious acknowledgments. "[O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington, * * * down to the present day," "rule[s] out of order government-sponsored endorsement of religion * * * where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." *Lee*, 505 U.S. at 641 (Scalia, J., dissenting).

Pairing coercion with sectarian prayers makes the Town's practice doubly unconstitutional. Government "may not thrust any sect on any person." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Forcing religious minorities either to participate in Christian prayer or to visibly withdraw "puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Lee*, 505 U.S. at 592.

Marsh did not approve prayers in a coercive environment; no coercion was alleged or apparent. Legislators were free to come and go with little comment; citizens were mere observers, confined to the

gallery. Even then, the only prayers that *Marsh* considered and approved were nonsectarian and not "explicitly Christian." 463 U.S. at 793 n.14. Petitioner and its amici seek to extend *Marsh* far beyond what it actually decided.

II. Requiring petitioner to avoid obviously sectarian prayers would not require difficult religious judgments, impermissible "parsing" of prayers, or censorship of private speech. Pet. Br. 41-42. Any possible difficulty categorizing "King of Kings" (Pet. Br. 42) does not make it difficult to categorize "Jesus Christ"; the prayers in this record are unambiguous. And government does not engage in censorship when it delegates the task of delivering a governmental prayer according to its own specifications.

III. The cumulative effect of petitioner's positions is astounding. Petitioner claims that government may endorse not just religion in general, but tenets of particular religions. Pet. Br. 41. Any limitation on the content of prayers would be unconstitutional. Pet. Br. 53. Only "legal sanctions" count as coercive (Pet. Br. 36), leaving government officials and guest chaplains free to admonish and harangue citizens to participate in sectarian prayers—even those that promise eternal hellfire to religious minorities.

This license would extend to all three branches of government. Pet. Br. 30-35. It would apply not only to the Greece Town Board, but to agency hearings and criminal trials. Indeed, under petitioner's proposed test, a parole officer could urge a parolee to accept Jesus Christ as his Savior and a caseworker could browbeat a welfare recipient for not attending church.

Petitioner is no longer arguing that prayer is permitted in legislatures; it is arguing that government is free to impose religious exercises of any kind in any context, provided that it does not fine or jail people or withhold benefits for resisting. Its position is irreconcilable with this Court's decisions and with any reasonable conception of religious liberty or freedom of conscience.

ARGUMENT

I. PETITIONER'S PRACTICE UNCONSTITUTIONALLY COERCES CITIZENS TO PARTICIPATE IN SECTARIAN PRAYERS.

"[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587. Petitioner's practice cannot be reconciled with this prohibition.

Nor can it be reconciled with the prohibition against governmental promotion of a particular faith. The great majority of petitioner's prayers use overtly Christian terms, and many invoke specifics of Christian theology. Such prayers cannot be thrust upon citizens assembled to participate in their local government.

Marsh upheld the delivery of nonsectarian prayers to state legislators before state legislative sessions; it does not authorize petitioner's practices here. It is one thing for a state legislature to sponsor prayers for those of its members who choose to participate, as in *Marsh* or in Congress. It is quite another for a town to press those prayers on a captive audience of the broader citizenry, as in Greece.

A. Citizens Are Coerced To Participate In Prayer.

Governmental "institutions must not press religious observances upon their citizens." *Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (Rehnquist, C.J., plurality opinion). Even "subtle and indirect" pressures are impermissible. *Lee*, 505 U.S. at 593. The government can neither "persuade [n]or compel" people to join in prayer. *Id.* at 599. Government cannot bring to bear public pressure, nor lend its support to peer pressure, to join in prayer. *Id.* at 593. Petitioner's practice cannot be squared with these principles.

1. At Town Board meetings, citizens are active participants whose attendance is all but obligatory.

Citizens who attend meetings of the Greece Town Board are not observers; they are active participants, often at the Board's invitation or direction. Although few citizens attend any given meeting, those few have little choice but to be there—to request Board action, take the oath of office, or receive commendations. They will reasonably believe that they must participate in the prayers to get what they want from the Board.

Indeed, many are *petitioners* to the Board. Those seeking a zoning change or a small-business permit are legally required to attend and make their case in a public hearing. *See* pages 5-6, *supra*. Others come to ask the Board to take action on municipal issues of personal concern; they have no other opportunity to address the Board as a body. C.A. App. A779.

New police officers and some other new employees attend to be sworn in, and family members attend to participate in the ceremony. *See* page 4, *supra*. There is a long history of conducting these ceremonies at Board meetings (C.A. App. A780-81), and a newly hired officer is in no position to disregard the tradition. For these officers and their families, attendance is not optional in any real sense.

Other citizens come, at the Board's invitation, to be recognized for civic accomplishments. *See* pages 3-4, *supra*. For these people, too, attending meetings is not really voluntary; the alternative is to forgo public recognition.

Children regularly attend and actively participate in the meetings. Athletic teams are honored; children are recognized for heroic acts and inducted into the Greece Youth Hall of Fame. Children attend to see their parents sworn in, and they speak in the public forum. *See* pages 4, 7-8, *supra*.

Children also attend as students, earning academic credit to satisfy a civics requirement. C.A. App. A294, A929. Supervisor Auberger explains the proceedings to them and engages them in dialogue. *See* page 6, *supra*.

It would be "formalistic in the extreme" to say that either adults or children have a real choice to forgo these occasions. *See Lee*, 505 U.S. at 595. Both the municipal issues raised by citizens and the more ceremonial events are important to those affected. The meetings are grass-roots democracy in action, and participation is a universal right of citizenship. "[T]he State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting

conformance to state-sponsored religious practice." *Id.* at 596.

The point is not that Greece has less freedom of action than Congress or state legislatures. Rather, its Board functions in fundamentally different ways than those bodies. If this case is to be decided by analogy to federal practices, the relevant benchmark is not the floor of Congress, but court proceedings, agency hearings, and naturalization ceremonies, where citizens actively participate.

2. Citizens experience substantial pressure to participate in the prayers.

The reasons that citizens attend, the physical setting of the meetings, the authority behind the prayers, the chaplains' requests, the lack of anonymity, and the fear of offending Board members converge to place substantial pressure on everyone present to join in the prayers. In these circumstances, few would have the fortitude to disregard a chaplain's instruction, much less to leave the room.

a. Board members, the Clerk, and eight heads of departments sit on a dais, facing the citizens. C.A. App. A863. The Town Supervisor addresses the citizens as he introduces the guest chaplain to give "our moment of prayer." *E.g.*, J.A. 37a-40a, 136a, 138a-39a.

The chaplain faces the assembled citizens; he does not face the Board. The prayer is offered to God, but it is also directed at the citizens. Often, the chaplain explicitly asks audience members to participate—to join in prayer, stand, or bow their heads. *See* pages 8-11, *supra*.

Citizens are seated directly before the chaplain and the Board, and are generally few in number. *See* page 2, *supra*. It is virtually impossible for anyone to step outside, or to decline to stand, without attracting notice.

Those who speak in the public forum or request permits in the public hearing are necessarily eager to make a good impression. On petitioner's five-member Board, it takes only three votes to deny a request; applicants cannot afford to offend anyone. *Perhaps* no Board member would think less of a citizen who refused to participate in the prayer. But the citizen has no way to know.

Newly hired police officers are necessarily mindful of their supervisor, the Chief of Police, who usually administers the oath. C.A. App. A780. Rookie officers cannot risk offending their new boss. And citizen honorees would be hard-pressed to breach decorum by resisting the protocol of the Board that is honoring them.

In addition to the pressure from authority figures at the front of the room, citizens who visibly decline to participate draw reactions from other citizens that embarrass and humiliate. Plaintiffs in their affidavits described the intense pressure they felt to join in the prayer. C.A. App. A1067-69, A1085. Understandably, few citizens decline.

b. Even though the court of appeals acknowledged the pressure on religious minorities (Pet. App. 23a, 26a), it dismissed our coercion argument on the ground that "the plaintiffs are adults." Pet. App. 23a n.8. But "the Constitution guarantees that government may not

coerce *anyone* to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587 (emphasis added). The question, for both adults and children, is whether a person "has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow." *Id.* at 593.

Social-science literature confirms that adults are readily susceptible to pressure to conform their outward behavior to what is expected of them. *Cf. Lee*, 505 U.S. at 593-94 (consulting psychology literature). Many adults will give obviously false answers to simple questions if everyone else does so.[7] They will misrepresent their moral convictions in the face of competing views.[8] Most adults will follow instructions, even deeply offensive or immoral ones, when they come from authority figures.[9] Compliance is further

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[7] Solomon E. Asch, *Effects of Group Pressure on the Modification and Distortion of Judgments*, in *Readings in Social Psychology* 2 (G.E. Swanson et al. eds., 2d ed. 1952) (judging length of lines); *see also* Rod Bond & Peter B. Smith, *Culture and Conformity: A Meta-Analysis of Studies Using Asch's (1952b, 1956) Line Judgment Task*, 119 Psychol. Bull. 111, 132-37 (1996) (collecting replications of Asch experiments).

[8] Richard Crutchfield, *Conformity and Character*, 10 Am. Psychologist 191, 193 (1955) (people willing to "violate[ ] their own inner convictions" when confronted with unanimous views on subjective values questions); *see also* Vernon Allen & Richard Crutchfield, *Generalization of Experimentally Reinforced Conformity*, 67 J. Abnormal & Soc. Psychol. 326 (1963) (conformity enhanced when authority figure affirms unanimous response of others).

[9] *See* Leonard Bickman, *The Social Power of a Uniform*, 4 J. Applied Soc. Psychol. 47, 51 (1974) (experimental subjects twice

enhanced when that authority figure is physically present.[10] Modern science thus validates Charles Carroll's observation in the First Congress: "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand." 1 Annals of Cong. 730 (757 in some printings) (Aug. 15, 1789) (J. Gales ed., 1834).

as likely to follow instructions from person in uniform); Charles K. Hofling et al., *An Experimental Study of Nurse-Physician Relationships*, 143 J. Nervous & Mental Disease 171 (1966) (21 of 22 nurses would administer dangerous doses of fictional drug on doctor's telephonic instruction); Wim H.J. Meeus & Quinten A.W. Raaijmakers, *Obedience in Modern Societies: The Utrecht Studies*, 51 J. Soc. Issues 155, 161-64 (1995) (91% of subjects would follow instructions to harass unemployed job applicant during employment exam, and collecting similar experiments); Stanley Milgram, *Obedience to Authority: An Experimental View* 33-36 (1974) (nearly all experimental subjects inflict electric shocks, to various degrees, on innocent victim, when instructed to do so); *id.* at 93-97 (compliance fell when instructions came from person with no apparent authority); *see also* Piero Bocchiaro & Philip G. Zimbardo, *Defying Unjust Authority: An Exploratory Study*, 29 Current Psychol. 155 (2010) (replicating Milgram using insults instead of electric shocks); Jerry M. Burger, *Replicating Milgram: Would People Still Obey Today?*, 64 Am. Psychologist 1 (2009) (replicating Milgram).

[10] Milgram, note 9, *supra*, at 59-62 (compliance declined when authority figure out of room); *see also* Bocchiaro & Zimbardo, note 9, *supra* (replicating Milgram's results on compliance when authority figure absent, using insults instead of electric shock); C. Bram Cadsby et al., *Tax Compliance and Obedience to Authority at Home and in the Lab: A New Experimental Approach*, 9 Experimental Econ. 343, 357 (2006) (compliance fell from baseline of 95.5-99.5% to 81.6% when authority figure absent and subjects' response time increased).

Citizens at Board meetings in Greece face both the pressure to comply with the instructions and expectations of the authority figures at the front of the room, who will soon be passing on citizens' requests, *and* the pressure to follow the lead of everyone around them. Social-science literature reinforces the common sense of the situation: brand-new employees, citizens accepting honors, and citizens seeking favorable action from the Board would be hard-pressed to resist. It ignores reality to say that there is no coercion here merely because the victims are adults.

c. The court of appeals assumed that children are no more present at Board meetings than at sessions of the Nebraska legislature. Pet. App. 23a n.8. In fact, children regularly attend meetings in Greece; and unlike children observing a state legislature, Greece's children actively participate. *See* pages 6-8, *supra*.

Children invited by the Board to receive awards as part of a group would need to resist the chaplain's request, the Board's watchful eye, the potentially negative reaction from strangers, and the pressure from teachers, coaches, and peers. It is unrealistic to expect a nine-year-old soccer player or an eleven-year-old cheerleader to remain seated while those around her stand, or to exit the room and leave her friends and teammates behind.

Civics students have even less freedom to excuse themselves. Their attendance must be verified in writing by a Town official and they must summarize the meeting to receive credit. C.A. App. A294, A779.

These children face pressure to religious conformity far exceeding that held unconstitutional in *Santa Fe*

Independent School District v. Doe, 530 U.S. 290 (2000). *Santa Fe* involved the boisterous atmosphere of a football game. Fans wanting to avoid the prayer could arrive late, or make a well-timed trip to the restrooms or concession stand, far more easily than children can avoid the prayers here. At Board meetings, there is "no real alternative which would * * * [allow them] to avoid the fact or appearance of participation." *Lee*, 505 U.S. at 588. So month after month, petitioner presses the Town's children to join in prayer.

d. The rare citizen willing to step outside could not do so without the risk of missing the very occasion for attending. Avoiding the prayer would require either exquisite timing and good luck, or a confederate inside the meeting who would leave at the appropriate time to summon the conscientious objector waiting outside.

Events proceed seamlessly and in rapid succession: the call to order, Pledge of Allegiance, prayer, awards, swearing in of new employees, public forum. More than 40% percent of the time, there is no one to be sworn in and no award, so the public forum immediately follows the prayer. *See* note 4, *supra*. If no one rises to speak, the forum closes in under a minute. *See* page 5, *supra*.

Citizens who attend a single meeting—to receive an award, be sworn in, apply for a permit, or address a pressing issue—would not know the Board's rhythms and procedures well enough to avoid the prayer. For those who attend regularly, consistent tardiness would soon become apparent to the Board and other regulars.

e. Nor should citizens be required to avoid part of the meeting, even if that were feasible. They are

entitled to attend the whole meeting—and those petitioning the Board are well advised to do so, to show respect, to get a better sense of Board members before speaking, and to hear comments on any related issues. No citizen should be required "to choose between compliance or forfeiture" or to "take unilateral and private action to avoid compromising religious scruples." *Lee*, 505 U.S. at 595-96.

If this Court were to open with "Our Lord and Savior Jesus Christ save the United States and this Honorable Court," no one would suggest that Jewish or Muslim lawyers could or should come dashing in after the cry to argue their cases. Arriving late is not a just or workable solution—not in this Court, and not in Greece either.

f. Staying put and remaining silent are no less problematic. Often, the chaplain requests or assumes everyone's participation. He asks those assembled to stand or bow their heads. *See* pages 10-11, *supra*. He speaks in the name of the group: "*we* ask these things," "*our* Christian faith." *E.g.*, J.A. 33a-36a, 88a, 98a-105a (emphasis added). All persons present become participants in the prayer—voluntarily or not—unless they visibly dissent.

Prayer is a religious *act*, not a passive symbol or display. *Cf. Lynch v. Donnelly*, 465 U.S. 668, 686 (1984) (describing créche as "passive symbol"); *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 664 (1992) (Kennedy, J., concurring in judgment in part and dissenting in part) (contrasting "purely passive symbols," which are easily ignored, with compulsion "to observe or participate in any

religious ceremony or activity"). Here, citizens face pressures to observe *and* participate.

In *Lee*, "the act of standing or remaining silent was an expression of participation in the rabbi's prayer." 505 U.S. at 593. The Court initially attributed this understanding to what "many" or "most" students would believe. *Id.* In *Santa Fe*, the Court drew the conclusion itself, holding without qualification that "delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship." 530 U.S. at 312. This holding was correct: in the religious and social conventions of our people, one manifests participation in a group prayer by posture, and by silence except when asked to speak or respond. To all but the mind-reader, participation and respectful silence are indistinguishable.

3. Petitioner's coercion test offers no meaningful protection.

a. Petitioner's definition of coercion strips the term of all meaning. Petitioner says that it need avoid only "coerc[ing] *adherence* to a particular faith," or "coerc[ing] anyone to *adopt* a particular tenet or belief." Pet. Br. 35, 39 (emphasis added). But plaintiffs need not show that they were compelled to *believe* in prayers, much less that they were pressed to change their religious affiliation. As even petitioner recognizes elsewhere, it is enough that plaintiffs were pressed to "*participate* in any religion or its exercise." Pet. Br. 14, 38 (quoting *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in judgment in part and dissenting in part)) (emphasis added); *accord Lee*, 505 U.S. at 587.

The Court's focus on religious participation follows from first principles. It is impossible to compel belief; visible behavior is all that government can hope to compel. This Court long ago recognized "the folly of attempting * * * to control the mental operations of persons, and enforce an outward conformity to a prescribed standard." *Davis v. Beason*, 133 U.S. 333, 342 (1890). No one would claim that government may require citizens to attend religious services as long as they are free to disbelieve what is preached there. It is no more reasonable to claim that government may press its citizens to join in prayers as long as they are free to disbelieve them.

b. Petitioner also suggests that only taxes and legal sanctions count as coercion. Pet. Br. 36. On that standard, government officials are free to admonish, harangue, and intimidate citizens to participate in prayers, as long as they do not formally penalize those who resist. But government can neither "force *nor influence*" a person in religious matters. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (emphasis added).

Petitioner later suggests that "condition[ing] any governmental benefits on participation" in the prayer might qualify. Pet. Br. 40. But petitioner does just that: it conditions the right to attend Board meetings, obtain official recognition, and petition the government for redress of grievances on observing the prayer and, for all but the most determined dissenters, participating in that prayer.

Perhaps petitioner means to require proof that citizens' requests are denied if they do not participate in the prayer. But nearly all actions that citizens seek

are discretionary, so it would be nearly impossible to prove that any one action was withheld *because* the requester declined to pray. And because the pressures to participate are so pronounced that few citizens refuse, proving a statistical pattern would also be impossible.

B. Petitioner's Prayers Are Unconstitutionally Sectarian.

Petitioner's practice violates the Constitution for a second and independent reason: petitioner directs sectarian prayers at its citizens. Government may not "lend[ ] its power to one or the other side in controversies over religious authority or dogma." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012) (internal quotation marks omitted). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

Some Justices have suggested that government may promote monotheism, but none have departed from the settled principle that government may not direct explicitly sectarian messages at the public, coercively or otherwise:

> [O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington, * * * down to the present day, has, with a few aberrations, ruled out of order government-sponsored endorsement of religion * * * where the endorsement is sectarian, in the sense of specifying details upon which men and women

> who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).

Lee, 505 U.S. at 641 (Scalia, J., dissenting) (citation omitted).

Perhaps some in the founding generation thought that the Constitution "permitted government invocation of Christianity," but "those narrower views of the Establishment Clause were as clearly rejected as the more expansive ones." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 897 (2005) (Scalia, J., dissenting). "*All* of the actions of Washington and the First Congress * * *, virtually all Thanksgiving Proclamations throughout our history, and *all* the other examples of our Government's favoring religion * * *, have invoked God, *but not Jesus Christ*." *Id.* (third emphasis added).

Indeed, "[t]he critically important aspect of the framing generation's compromise was that only the most general, nonsectarian reference to God was deemed appropriate" in addressing the public. Michael Meyerson, *Endowed by Our Creator: The Birth of Religious Freedom in America* 11-12 (2012). The Founders maintained this approach at a time when the non-Christian population was tiny. In an era with more religious diversity, their caution carries even greater wisdom.

1. Petitioner's prayers advance and proselytize Christianity.

Month after month, petitioner invited Christian pastors to offer prayers, without ever requesting or

suggesting that the prayers be inclusive. The predictable result was Christian prayers: two-thirds contained uniquely Christian language. *See* pages 9-10, *supra*. In the eighteen months before the record closed, twelve of the fourteen prayers in the record contained such references. J.A. 129a-43a.

The Board did not ask its chaplains to refrain from proselytizing, advancing, or disparaging any particular faith. Consequently, many chaplains elaborated on exclusively Christian beliefs, referring to "the saving sacrifice of Jesus Christ on the cross" (J.A. 88a), "the plan of redemption that is fulfilled in Jesus Christ" (J.A. 99a), "the life and death, resurrection and ascension of the Savior Jesus Christ" (J.A. 129a), or "the new life of the risen Christ" (J.A. 134a). They discussed the workings of the Holy Spirit (*e.g.*, J.A. 56a, 89a, 123a), the events of Pentecost (J.A. 134a), and the belief that God "has raised up the Lord Jesus" and "will raise us, in our turn, and put us by His side" (J.A. 89a).

The Board did not suggest that chaplains refrain from asking citizens to recite prayers in unison (J.A. 56a), inviting citizens to church events (J.A. 45a-46a, 64a-65a), or denouncing the "ignorant" minority who oppose government-sponsored prayers (J.A. 108a). Indeed, Supervisor Auberger indicated that he would take no corrective measures even if guest chaplains presented racist, anti-Catholic, anti-Semitic, or homophobic rants. C.A. App. A819-21.

Paraphrasing the court of appeals, petitioner assumes that proselytizing prayers necessarily "preach conversion, denigrate other religious traditions, or

threaten nonadherents." Pet. Br. 12-13; *cf.* Pet. App. 21a. That definition captures only the most extreme forms of proselytizing. Even a passive display may proselytize if prominently and persistently displayed. "[P]ermanent erection of a large Latin cross on the roof of city hall * * * would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in judgment in part and dissenting in part); *see also id.* at 664 n.3 (passive displays recognizing "every significant Christian holiday while ignoring the holidays of all other faiths" might "apply[ ] pressure to obtain adherents").

Petitioner's prayers promote a single faith. Repeatedly praying in explicitly Christian terms, invoking the Christian theology of salvation through Jesus, all with the imprimatur of the Town, in an environment that pressures all present to participate, advances and proselytizes Christianity.

2. Petitioner's alleged equal-access policy and its lack of discriminatory intent do not justify either coercion or sectarianism.

Petitioner does not dispute that the overwhelming majority of prayers were explicitly Christian. Rather, it contends that this resulted from a neutral equal-access policy and not from a discriminatory intent. Pet. Br. 19, 21-22, 44. But there was no equal-access policy, and it would not matter if there were.

a. Under petitioner's stylized version of the facts, its prayers have been offered by "volunteers * * * from a multitude of faith traditions" (Pet. Br. 13), "according

to a facially neutral policy" (Pet. Br. 52) that allows "any citizen," including "atheists" (Pet. Br. 7), an "opportunity" to deliver "an opening statement" (Pet. Br. 53).

The reality is that petitioner never adopted *any* policy, let alone one made known to the public. Pet. App. 4a, 20a, 29a-30a. Petitioner gave its prayer practice little thought, and gave the consciences of religious minorities no thought at all.

Selection of chaplains was successively delegated to three rank-and-file employees who were given no instructions but to "call a pastor." C.A. App. A177. These employees had no system; they exercised unfettered discretion. *See* pages 12-13, *supra*. The one pattern was frequent reliance on a small number of repeat chaplains who would come whenever asked. *Id.*

The alleged policy of allowing "atheists and nonbelievers to open the meeting with a statement of their choosing" (Pet. Br. 20) was never written down, never formally adopted, and never announced or publicized apart from publicity incidental to this litigation. Pet. App. 20a, 30a. It produced exactly four prayers by non-Christians, all in 2008. Pet. App. 4a. In the following eighteen months all prayers were once again offered by Christian clergy. Pet. App. 5a. Petitioner's flirtation with pluralism, in response to this lawsuit, did not even last until the record closed. It cannot negate more than eleven years of Christian dominance.

Petitioner mentions only its "most recent prayer-giver list." Pet. Br. 6. That list, filed six months *after* discovery closed, makes a show of including non-

Christians but demonstrates that the task was not taken seriously. It lists more than a dozen Jewish groups, but several are cemeteries, several share a common address, and for nearly all of them, petitioner did not bother to find a phone number. C.A. App. A1053-55. Petitioner also did not go straight down the list, as it had promised the district court. *See* pages 13-14, *supra*. The court of appeals thus had ample reason to treat petitioner's claim of inclusivity with skepticism. Pet. App. 4a, 20a.

We do not now contend that petitioner intentionally excluded non-Christians. But neither did it affirmatively try to include them, except for a brief period at the beginning of the lawsuit. Nor did it create a genuine equal-access policy.

b. Even if petitioner had followed a truly neutral rotational scheme, that would not lift the Town's Establishment Clause obligations. Those obligations apply to what the government does, regardless of how it selects those who do it, and whether or not it pays them. For example, some government social-service departments use unpaid volunteers to serve clients. *See, e.g.*, Newport News, *Volunteer Services Program*, http://tinyurl.com/volunteer-services. Those volunteers cannot proselytize clients in any way that would be forbidden to paid employees in the same department.

Leading a captive audience of adults and children in government-sponsored prayer is a sensitive task. It cannot be casually delegated without any guidance. *Cf.* Jeremy G. Mallory, Comment, *"An Officer of the House Which Chooses Him, and Nothing More": How Should Marsh v. Chambers Apply to Rotating Chaplains?*, 73

U. Chi. L. Rev. 1421 (2006) (guest chaplains need oversight because, unlike in-house chaplains, they are unfamiliar with the audience and lack structural incentives to minister in a pluralistic way). The sectarian and often proselytizing content of prayers, and chaplains' requests for participation, were not products of chaplains' bad intentions; they followed from the Town's neglect of its constitutional obligations.

c. More generally, petitioner contends that all that matters is whether "the government purposely employs such prayers as a mouthpiece to advocate on behalf of a particular faith." Pet. Br. 18; *see also* Pet. Br. 38 (requiring "intent to proselytize"). The content of prayers, and the chaplains' intent, are allegedly irrelevant. Pet. Br. 20-22, 26, 44, 53.

But if petitioner *in fact* pressured its citizens to join in Christian prayer, it does not matter whether Board members intended to impose Christianity, were recklessly indifferent to the rights of religious minorities, or were simply oblivious. The Constitution necessarily applies to what petitioner did, whether or not it also applies to what petitioner thought. *See Lee*, 505 U.S. at 588 (the "question is not the good faith of the school").

"[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind" a legislature's actions. *Palmer v. Thompson*, 403 U.S. 217, 224 (1971). Where a law is constitutional in its actual operation, the difficulty of assessing intent has often been a reason to refrain from inquiring into suspected improper motive. But the

converse is equally true: where, as here, a legislative action is unconstitutional in its actual operation, government should not be allowed to hide behind the difficulties of proving intent. It does not "matter that a legislature consists entirely of the pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559 (1993) (Scalia, J., concurring in part and concurring in judgment).

If the action itself were irrelevant, and intent were all that mattered, then a town council could open its meetings with even the most proselytizing prayer, claiming that it does so not with an "intent to proselytize" (Pet. Br. 38), but instead because the prayer is familiar to its members. "Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992).

Nor did *Marsh* turn on intent. *Marsh* referred to "impermissible motive" in discussing the selection of a chaplain, not the content of the prayers. 463 U.S. at 793. In discussing the prayers' content, the Court stated that the prayers had not been "exploited to proselytize or advance any one" faith (*id.* at 794-95). In reaching that conclusion, the Court did not analyze the legislature's intent; rather, it explained that the prayers "harmonize[d] with the tenets of some or all religions" and were a "tolerable acknowledgment of beliefs widely held." *Id.* at 792 (internal quotation marks omitted); *see also* pages 44-47, *infra*. The same cannot be said of the prayers in Greece.

C. Coercion And Sectarianism Are Mutually Reinforcing Burdens On Religious Conscience.

Petitioner's two constitutional violations are mutually reinforcing. Governmental pressure to participate in prayer is unconstitutional; governmental pressure to participate in sectarian prayer is worse. Government "may not thrust any sect on any person." *Zorach*, 343 U.S. at 314.

Petitioner forces minorities either to participate in Christian prayer in violation of their own religious beliefs, or visibly to withdraw and call attention to their religious nonconformity, just before they address the Board on some matter of public or personal importance. Pet. App. 23a. The objection to this choice is not merely a matter of taking offense, as petitioner assumes. Pet. Br. 47-48. It is that the citizen is pressed to participate in a prayer that conflicts with his own understanding of religion. The injury is not just to feelings, but also to conscience.

As a rabbi testified in what became one of this Court's leading cases, "the concept of Jesus Christ as the Son of God" is, to Jews, "practically blasphemous." *Schempp v. Sch. Dist. of Abington Twp.*, 177 F. Supp. 398, 401 (E.D. Pa. 1959) (internal quotation marks omitted), *aff'd after intervening remand*, 374 U.S. 203 (1963). To note this way of understanding Christianity is not to attack it, but to take it seriously.

Many adherents of minority faiths who can conscientiously join in a nonsectarian prayer cannot conscientiously join in a prayer that they may find blasphemous. When the State pressures them to do so,

it "puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Lee*, 505 U.S. at 592.

Requiring petitioner to respect the consciences of non-Christians does not create a "heckler's veto." Pet. Br. 47. The heckler prevents others from speaking to a willing audience by shouting them down or creating a disturbance. Here, the objection is to being pressed to *join* in the prayers of others. Respondents are no more hecklers than were the plaintiffs in *Lee* and *Santa Fe*.

The charge of a veto also implies one or few objectors. But only 76% of the population self-identifies as any kind of Christian. Barry A. Kosmin & Ariela Keysar, *American Religious Identification Survey (ARIS 2008), Summary Report* 3 (2009), *available at* http://tinyurl.com/aris-report. A quarter of the population—nearly eighty million Americans—cannot be dismissed as hecklers.

Petitioner seeks to impose the prayers of Christianity—a religion with a revered tradition of martyrs who went to the lions or the stake rather than go through the motions of praying to false gods. It cannot credibly dismiss as insignificant the burden of forced religious participation, real or feigned.

D. *Marsh* Did Not Address, Let Alone Approve, Coercive Or Sectarian Prayers.

Petitioner and its amici hinge nearly everything on *Marsh*. Pet. Br. 12 ("This case can begin and end with *Marsh v. Chambers*."). But the prayers at issue in *Marsh* were neither coercive nor explicitly Christian.

1. *Marsh* approved Nebraska's practice of legislative prayer. It did not approve all possible ways in which legislative prayer might be implemented, without regard to context.

After recounting the facts in Part I, the opinion in Part II rejected a challenge to "the bare fact that a prayer is offered." *Marsh*, 463 U.S. at 793. The Court reviewed the history of congressional prayer and, briefly, the history of prayer in state legislatures. *Id.* at 786-92. The opinion mentioned neither local government nor citizen participation.

Part III considered "whether any features of the Nebraska practice violate the Establishment Clause." *Marsh*, 463 U.S. at 792. Coercion was not among the challenged features, and understandably so. In Congress and state legislatures, "adults are free to enter and leave with little comment and for any number of reasons." *Lee*, 505 U.S. at 597. Much noncontroversial business, including the prayers, is conducted with few members present. Legislators who appear for the prayers do so voluntarily. Already in Madison's time, Congress's opening prayers received only "a scanty attendance." Elizabeth Fleet, *Madison's "Detached Memoranda,"* 3 Wm. & Mary Q. 534, 559 (1946).

In both Congress and state legislatures, ordinary citizens are excluded from the legislative floor and confined to a gallery. They are mere spectators, not permitted to address the legislative body and with no business to conduct before it. Twenty-three states explain that "no one—other than (perhaps) an elected legislator—has a right to speak on the floor" of a state

legislature. Indiana Br. 14. The Nebraska legislature was no different. *See Marsh*, J.A. 71-72 (legislative chamber closed to public, which is confined to gallery and, even then, "usually is not there" for prayer).

Accordingly, as one of petitioner's amici explains, prayer before a state legislature is properly understood as directed to legislators: the "chaplain is not serving the general public or imposing religious practices on the rest of society; rather, the chaplain is accommodating the voluntary religious practices of government employees"; "government is appointing ministers to minister to itself." Becket Fund Br. 23, 25.

Indeed, the district court in *Marsh* found that the prayers there were "an internal act[,] that is, one directed at the governmental unit itself or its own members," "by and for the legislators themselves," "with no significant impact on anyone else." *Chambers v. Marsh*, 504 F. Supp. 585, 588-89 (D. Neb. 1980), *rev'd in part*, 675 F.2d 288 (8th Cir. 1982), *rev'd*, 463 U.S. 783 (1983). Likewise, in this Court, Nebraska described the prayers as "a matter of internal daily procedure directed only at the legislative membership, not at the public at large." Pet. Br. 30, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-23).[11]

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[11] Even congressional prayers, directed solely to legislators, are far less commonly sectarian than the prayers directed to the audience in Greece; they are also far less commonly sectarian than petitioner and its amici suggest. Today, fewer than fifteen percent of prayers in the House, and fewer than five percent in the Senate, invoke "Jesus," "Christ," "Your Son," or the "Holy Spirit." Considering other explicitly Christian terms (such as "resurrection" and "crucifixion," which are unmentioned), non-Christian terms (such as "Allah," "Buddha," and "Muhammad"),

2. One of the plaintiff's objections in *Marsh* was that the prayers were "in the Judeo-Christian tradition." 463 U.S. at 793. In rejecting that challenge, the Court distinguished explicitly Christian prayers, which had already been eliminated:

> Palmer [the chaplain] characterizes his prayers as "nonsectarian," "Judeo-Christian," and with "elements of the American civil religion." Although some of his earlier prayers were often explicitly Christian, Palmer removed all references to Christ after a 1980 complaint from a Jewish legislator.

Id. at 793 n.14 (citation omitted). Thus, the only prayers actually upheld were nonsectarian, Judeo-Christian, and *not* explicitly Christian. That is why

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and even terms such as "King of Kings" and "Lord of Lords" (Pet. Br. 42), does not materially change the numbers. Almost never does a chaplain ask citizens physically to participate. *See* Office of the Chaplain, U.S. H.R., *Prayer Archive*, http://chaplain.house.gov/archive/index.html; *Id.*, *Guest Chaplains*, http://chaplain.house.gov/chaplaincy/guest_chaplains.html; *Congressional Record Online*, http://thomas.loc.gov/home/Browse.php?&n=Issues&c=112 (click "HTML" in "Senate" column; then click hyperlink in item 1); *see also Prayers in the 112th Congress*, http://prayersinthe112thcongress.com/ (collecting transcripts for 112th Congress in searchable form).

The mistaken claim that a majority of prayers in the 112th Congress were explicitly Christian (*see* U.S. Br. 20 (citing Br. of Members of Cong. in Supp. of Cert. 10-20)) was based on a vastly expansive definition in which, for example, "Holy and Righteous Father," and "Lord and Creator," were deemed explicitly Christian. Members Cert. Br. 17-18. Such a count bears no relationship to the facts of this case or to anything in our argument.

they "harmonized with the tenets of some or all religions" and represented a "tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792 (citation omitted).

Petitioner and its amici labor to erase these facts. Petitioner says that the "prayers after 1980" were not in the record. Pet. Br. 25. But as the Court's citation to the Joint Appendix shows, the chaplain's account of his prayers in 1980 and later *was* in the record, and the Court relied on it. *Marsh*, 463 U.S. at 793 n.14 (citing J.A. 49 for the end of explicitly Christian prayers).

Reverend Palmer now contends that by "nonsectarian," he meant only that his prayers did not specify details upon which *Christian* denominations differ. Palmer Br. 15. But how Palmer understood "nonsectarian" is a red herring. What matters is the Court's understanding that his prayers were no longer "explicitly Christian" and that all references to Christ had been removed. *Marsh*, 463 U.S. at 793 n.14; *id.*, J.A. 49a; *see also* Palmer Br. 15 n.10 (quoting Palmer's testimony (from J.A. 76a) that "the name of Christ Our Lord" is not consistent with the "Judeo-Christian tradition"). The Court's understanding about that cannot be altered by a witness's statements thirty years later about what he really meant.

Petitioner says that voluntary cessation of an earlier practice would not have been a defense to an injunction in *Marsh*. Pet. Br. 26. That would be true if the Court had attended to that issue, but voluntary cessation went unmentioned, and the Court was under no obligation to raise the issue on its own. Justice Stevens in dissent may have been unwilling to rely on

the chaplain's new practice, but the majority *did* rely on it. *Marsh*, 463 U.S. at 793 n.14.

3. Petitioner repeatedly quotes or paraphrases one clause in *Marsh*: that legislative prayer may not be "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95; *see* Pet. Br. 2, 9, 12, 17-20, 25-27, 38, 51, 55. But petitioner misses the point of the sentence. The prayers in *Marsh* did not "advance any *one* * * * faith or belief," because they were no longer "explicitly Christian." 463 U.S. at 793 n.14, 794-95 (emphasis added). They did not proselytize or *advance* that one faith for the same reason. Petitioner ignores the word "advance," effectively deleting it from the sentence.

The Solicitor General struggles with "advance" before also depriving it of meaning: "It is not clear" what the Court meant by advance, but "presumably" the word was used to encompass "a government affiliation with or a declaration of government allegiance to a particular faith or belief." U.S. Br. 17. By the end of the page, the government's treatment of "advance" has collapsed into the claim that explicitly Christian prayers do not advance Christianity because *Marsh* upheld them. U.S. Br. 17-18. But, as already explained, *Marsh* did *not* uphold explicitly Christian prayers.

4. In *Allegheny*, the Court explained *Marsh* as we do: "The legislative prayers involved in *Marsh* did not violate this principle [against the government's affiliation with a single faith] because the particular chaplain had 'removed all references to Christ.'" *Allegheny*, 492 U.S. at 603 (quoting *Marsh*, 463 U.S. at

793 n.14). Nor did any dissenters claim that *Marsh* had approved explicitly Christian prayer. Rather, they argued that the créche and menorah at issue there, each specific to a single faith, were temporary and passive displays acknowledging widely celebrated holidays that had acquired secular significance. *Allegheny*, 492 U.S. at 663-65 (Kennedy, J., concurring in judgment in part and dissenting in part). Petitioner's prayer practice is not temporary, not passive, not tied to a holiday, and not significantly secular.

In later opinions, three of the four *Allegheny* dissenters also described *Marsh* as we do. In his *McCreary* dissent, Justice Scalia placed *Marsh* alongside George Washington's first Thanksgiving Proclamation as illustrations of permissible governmental sponsorship of "monotheistic" but "nondenominational" religious observances. *McCreary*, 545 U.S. at 893-94 (Scalia, J., dissenting); *see also Van Orden*, 545 U.S. at 688 n.8 (Rehnquist, C.J., plurality opinion) (characterizing *Marsh* as case in which "chaplain removed all references to Christ").

5. Unlike in *Marsh*, the prayer opportunity here has been exploited to advance Christianity because the prayers are explicitly Christian. The prayer opportunity has also been exploited to proselytize Christianity. *See* Part I.B., *supra*. The coercive environment serves only to exacerbate that exploitation. *See* Part I.A., *supra*.

E. Coercion Should Be Ameliorated, And Obviously Sectarian Prayers Should Be Eliminated.

Because neither court below has yet considered remedies, we address them only in broad outline.

We assume that some form of prayer will be allowed at meetings of local legislative bodies, and we have not, at any point in this litigation, asked that they be eliminated altogether. If prayers are to be presented, the challenge is to do so with the least violence to constitutional principles and to conscience.

Pressure to join in the prayers is inherent in Board meetings; it cannot be eliminated without discontinuing the prayers. But the pressure can be ameliorated. The Board could schedule the prayer a few minutes before meetings are called to order, and make clear that the prayer is only for those who choose to participate. The podium could be turned so that chaplains face the Board. Chaplains could be instructed not to request citizen participation. *See also* U.S. Br. 23-24 (suggesting various partial remedies for coercion, without acknowledging a violation).

Because the pressure to join in the prayers cannot be eliminated, it is essential to eliminate sectarianism. Hence, prayers that are obviously sectarian—using the definition of "sectarian" that Justice Scalia provided in his *Lee* dissent, 505 U.S. at 641—should be prohibited. This remedial measure would follow the lead of the National Conference of State Legislatures, which has endorsed Guidelines that tell chaplains "to use common language and shared symbols which are acceptable and understandable and not offensive or

unintelligible." Nat'l Conf. of State Leg., *Inside the Legislative Process, Prayer Practices* 5-146 (2002), *available at* http://tinyurl.com/ncslprayer. "In opening and closing the prayer, the leader should be especially sensitive to expressions that may be unsuitable to members of some faiths." *Id.*

Thirty-seven state legislative bodies have guidelines for chaplains—including legislative bodies from twelve states that joined an amicus brief denouncing such guidelines. *Compare id.* at 5-153 (listing legislative bodies with guidelines for chaplains), *with* Indiana Br. 19-20. The House of Representatives reminds guest chaplains that the House "is comprised of Members of many different faith traditions," and it prohibits mention of "sectarian controversies." App. 1a-3a (obtained from guest chaplain). Similar steps should be taken here.

II. NOTHING REQUIRES EITHER THE COURT OR THE TOWN TO IGNORE THE CONTENT OF THE PRAYERS.

Petitioner claims not only that it may impose on the consciences of religious minorities, but that the Constitution actually prohibits any remedy. In petitioner's view, neither the Court nor the Town can review the prayers' content, because doing so would require difficult judgments, conflict with language in *Marsh* and *Lee*, and violate the Free Speech Clause. Petitioner is wrong on all counts.

A. Obviously Sectarian References Can Be Readily Identified.

Petitioner argues that it cannot review the content of its guest chaplains' prayers because it is impossible to distinguish between sectarian and nonsectarian prayers without making thorny religious judgments. Pet. Br. 41-44. If that were true, the solution would be to prohibit *all* the prayers, not to permit even the most extreme ones. But in practice, the distinction is easily drawn.

This Court has had no difficulty identifying the obviously sectarian. *Marsh* readily identified "all references to Christ" as "explicitly Christian." 463 U.S. at 793 n.14. *Allegheny* easily concluded that the créche was sectarian, and no dissenter disagreed. 492 U.S. at 598. And Justice Scalia has twice analyzed the nation's nonsectarian historical tradition without becoming ensnared in difficulties. *See McCreary*, 545 U.S. at 897 (Scalia, J., dissenting); *Lee*, 505 U.S. at 641 (Scalia, J., dissenting).

The Fourth Circuit, which for several years has enforced a rule requiring government-sponsored prayers to be nonsectarian, has also focused on obvious markers of sectarianism. *See, e.g., Joyner v. Forsyth Cnty.*, 653 F.3d 341, 349-50 (4th Cir. 2011) (references to Jesus Christ, "Cross of Calvary," and "Virgin Birth"); *Wynne v. Town of Great Falls*, 376 F.3d 292, 298-300 (4th Cir. 2006) (frequent references to Jesus Christ). Even petitioner and its amici had no difficulty recognizing obviously sectarian prayers. *See, e.g.*, Pet. Br. 31 (arguing that certain prayers were "explicitly Christian"); Bradley Br. 30 ("clearly sectarian"

prayers); Indiana Br. 10-11 ("exclusively Christian prayers"); Becket Fund Br. 8 ("faith-specific prayers").

Petitioner nevertheless asserts that the line between explicitly sectarian and inclusive prayers is hard to draw at the margin. Pet. Br. 42-44. But "[o]ur jurisprudence in this area is of necessity one of line-drawing, of determining at what point a dissenter's rights of religious freedom are infringed by the State." *Lee*, 505 U.S. at 598. Even if "King of Kings" were difficult to classify (*see* Pet. Br. 42), "Jesus Christ" is not. The prayers in this record contain religious doctrines and names for God that are unambiguously associated only with Christianity.

Petitioner's argument simply proves too much: if courts, towns, and chaplains cannot draw lines in this area, then *all* prayers would be allowed—or all would be disallowed. *Marsh*'s prohibition against prayers that proselytize, advance, or disparage would be unconstitutional. Sectarian prayers are in fact easier to identify than prayers that proselytize: a tradition dating to the Founding identifies the former; no such history exemplifies the latter.

Petitioner's line-drawing argument rests largely, if not entirely, on hypotheticals. Pet. Br. 42-43. Forsyth County joined an amicus brief here, but it makes no claim that it has had trouble complying with the ruling in *Joyner*, 653 F.3d at 349-50. There has been no showing that the municipalities involved in *Turner v. City Council*, 534 F.3d 352 (4th Cir. 2008), *Wynne*, 376 F.3d at 298-99, or *Simpson v. Chesterfield County*, 404 F.3d 276 (4th Cir. 2005), have experienced difficulty maintaining a court-ordered or self-imposed

nonsectarian requirement. These real-world experiences provide a firmer basis for a constitutional rule than does a litigator's conjecture.

B. *Marsh* Does Not Preclude Review Of The Town's Prayers.

Petitioner contends that *Marsh*'s conditional admonition against parsing "the content of a particular prayer" precludes any review of religious language. Pet. Br. 41-42. But *Marsh* did not say that courts are to *ignore* the content of prayers. Here is what the Court actually said:

> The content of prayer is not of concern to judges *where, as here, there is no indication* that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. *That being so,* it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

463 U.S. at 794-95 (emphasis added).

Thus, before a court adopts a hands-off approach, it must satisfy itself that there is "no indication" that the prayers proselytize or advance any one faith. As Judge Wilkinson explained in *Joyner*, simple review of invocations cannot constitute impermissible "parsing," for that "stark approach [would] leave[ ] the court without the ability to decide the case, by barring any substantive consideration of the very practice under challenge. It is to say the least an odd view of the judicial function that denies courts the right to review the practice at issue." 653 F.3d at 351.

C. *Lee* Does Not Preclude Guidelines For Guest Chaplains.

Petitioner also argues that language in *Lee* requires disregarding the content of prayers and precludes guidelines for guest chaplains. Pet. Br. 41 ("[I]t is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." (quoting *Lee*, 505 U.S. at 588 (internal quotation marks omitted))). The court of appeals cited a related passage from *Lee*, which stated that government may not "establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds." Pet. App. 15a (quoting *Lee*, 505 U.S. at 590). But those statements, made in a context in which all government prayer is prohibited, are inapplicable here, where some government prayer *is* permitted.

Lee holds that where government-sponsored prayer is *prohibited*, making the prayer nonsectarian will not save it. It does not answer the question at issue here: where government-sponsored prayer is *permitted*, does sectarian prayer exceed the scope of the permission? *See Turner*, 534 F.3d at 355-56 (O'Connor, J.) (rejecting argument that passage from *Lee* invalidated city's rule requiring prayers to be nonsectarian). *Lee* did not say that the prayer must be delivered uncensored (*see* Pet. Br. 41); it said the prayer could not be delivered at all. Where government-sponsored prayer is permitted, a prayer to God is plainly more inclusive than one to "Jesus" or "Allah." Indeed, *Lee* recognized that "a prayer which uses ideas or images identified with a particular religion may foster a different sort of

sectarian rivalry than an invocation or benediction in terms more neutral." 505 U.S. at 588; *see also id.* at 640 (Scalia, J., dissenting) (speaking favorably of "giving general advice on inclusive prayer for civic occasions").

The court of appeals suggested that the quoted language from *Lee* might leave municipalities with "few means" to cabin chaplains' remarks. Pet. App. 27a. But if the Board delegates the prayer to volunteers, of course it may control the scope of the delegation. A governmental entity may "regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). Those who are unable or unwilling to offer inclusive prayers are free to decline the invitation, but they are not free to change the delegated task.

D. Public-Forum Doctrine Does Not Immunize The Town's Prayers From Review.

Petitioner asserts yet another reason for ignoring its prayers: guest chaplains allegedly pray in a public forum protected by the Free Speech Clause and exempt from Establishment Clause scrutiny. Pet. Br. 44-45, 52-53. Chaplains cannot be given rules or even guidelines, says petitioner, for fear of viewpoint discrimination. Pet. Br. 44, 53. *But see* U.S. Br. 12 n.4 (no forum because prayers perform public function); *id.* at 17 n.6 (*Marsh*'s limitations on content of prayers apply to guest chaplains).

Petitioner has not created a public forum; its prayers are manifestly governmental. The Board

decides to include a prayer. The Board's employee selects the prayer-giver. The Board calls that person its "chaplain"—a term that refers to clergy who serve a secular institution such as a legislature, military, prison, or hospital. Petitioner's chaplains perform a function for the Town, not for themselves or their churches.

The Board chooses the prayer's place on the agenda. The selected chaplain, and no one else, gets that time to pray. The prayer slot is not open "for indiscriminate use by the general public." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983).

Chaplains are invited to pray. Some may make brief personal remarks incidental to the prayer, but their speech is narrowly circumscribed by the governmental function they are called upon to perform. They are not free to complain about potholes or to ask for a zoning change.

Petitioner's suggestion that a chaplain might give a nonreligious "opening statement" (Pet. Br. 53) is a litigator's fiction. The presentation is introduced, and listed on agendas, as a "prayer." J.A. *passim*; C.A. App. A448-A570. Even petitioner's brief in this Court uniformly refers to "prayer-givers," not opening speakers or any other euphemism.

In *Lee*, where the school controlled the event and decided that a prayer should be given, the Court treated the prayer as obviously governmental even though it was composed and delivered by outside clergy. 505 U.S. at 581, 587. Similarly in *Santa Fe*, where the school controlled the event and decided to allow a "prayer or message," the prayer was

governmental even though the selection process was delegated to a student election, the elected student could deliver some messages other than a prayer, and the student composed the prayer without input from the school. 530 U.S. at 297-98 & n.6, 302-03. The "alleged 'circuit-breaker' mechanism of the dual elections and student speaker [did] not turn public speech into private speech." *Id.* at 310. *Lee* and *Santa Fe* are dispositive. *See also Marsh*, 463 U.S. at 794 n.18 (noting that some legislatures use guest chaplains, without suggesting that the analysis would differ in those circumstances).

Petitioner cites cases on religious speech in public forums. Pet. Br. 53. But those cases involve speech with no hint of governmental sponsorship, and only those who chose to attend received the message. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (after-school club with parental permission slips); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (films shown outside school hours); *Widmar v. Vincent*, 454 U.S. 263 (1981) (student club on college campus). Likewise, in cases on funding schools through "true private choice," the religious education is chosen by a willing recipient. *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). Here, as in *Lee* and *Santa Fe*, everyone listens to the Board's chaplain, not because they chose to do so, but because the Board chose for them.

There is an actual public forum later in the meeting, named as such, in which citizens petition the government for redress of grievances. In that forum, the Board does not select the speakers, it does not tell them what to talk about, and more than one person is

permitted to speak. The differences between that forum and the official prayer are obvious.

Moreover, if guest chaplains have free-speech rights, *Marsh*'s ban on prayers that proselytize, advance, or disparage would be impermissible. Such prayers are obviously protected when not governmental. *See, e.g., Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 160-62 (2002) (proselytizing); *Cantwell v. Connecticut*, 310 U.S. 296, 308-11 (1940) (disparaging). Indeed, because prayer itself reflects a viewpoint (*see Good News*, 533 U.S. at 110), the Board would have to open the opportunity to purely secular messages and to anti-prayer rants. And the guidelines issued by many states and the House of Representatives, and countless municipalities' self-imposed policies requiring nonsectarian prayers (*e.g.*, *Simpson*, 404 F.3d 276), also would be unconstitutional.

Petitioner cannot have it both ways. The Town cannot simultaneously rely on the governmental tradition and prerogative identified in *Marsh* (Pet. Br. 27-35) and on the hands-off regime that governs private speech (Pet. Br. 44-45, 52-53). It cannot sponsor prayer in its meetings but disclaim responsibility for that prayer. When the Town delegates to a single clergyman the power to control part of an official Town meeting, the constitutional obligations that bind the Town accompany the delegation. Petitioner may not use "established clergy [as] convenient auxiliaries." James Madison, *Memorial & Remonstrance Against Religious Assessments*, para. 8 (1785), reprinted in *Everson*, 330 U.S. at 68.

III. THE CUMULATIVE EFFECT OF PETITIONER'S POSITIONS WOULD BE TO LICENSE SECTARIAN, PROSELYTIZING WORSHIP BY THE GOVERNMENT IN ANY SETTING.

Petitioner proposes that the Court eliminate the *Lemon* and endorsement tests (Pet. Br. 22-27, 40-50) and replace them with its anemic version of the coercion test (*see* pages 30-32, *supra*). It seeks to eliminate one test, and gut the other. The cumulative effect of its proposals is staggering.

Petitioner's objection is not just to *Lemon* or the endorsement test; it is to the whole history of Establishment Clause jurisprudence. *Lemon* was a formulation of "the cumulative criteria developed by the Court over many years." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The endorsement test has been applied for half a century. *See Engel v. Vitale*, 370 U.S. 421, 430-31, 436 (1962) (invalidating "governmental endorsement of * * * prayer," with or without coercion). Six Justices applied the endorsement test in *Santa Fe*, 530 U.S. at 305-08, 316. To discard this jurisprudence in one fell swoop is to invite renewed litigation of all the practices that the Court has already considered and to wreak havoc in the lower courts. That is especially ill-advised because there is coercion here; the Court "can decide the case without reconsidering the general constitutional framework" for the myriad contexts subject to the Establishment Clause. *Lee*, 505 U.S. at 587.

Furthermore, petitioner would let government endorse or advance not merely religion in general, but "a particular religion." Pet. Br. 41. Government could

endorse or advance Christianity, Lutheranism, biblical inerrancy, or any other religious doctrine. According to petitioner, the line-drawing involved in "censor[ing]" such messages "is precisely what this Court declared unconstitutional in *Lee*." *Id.* But whatever disagreement there may be about government's endorsing religion in general, there is broad consensus against "government-sponsored endorsement of religion * * * where the endorsement is sectarian." *Lee*, 505 U.S. at 641 (Scalia, J., dissenting).

If, as petitioner proposes, sectarian endorsements are permitted (Pet. Br. 41-42), dominance by a single faith is "irrelevant" (Pet. Br. 21), and guidelines are unconstitutional "censorship" (Pet. Br. 41), nothing would preclude the Dearborn City Council from opening its meetings with a steady stream of Imams who lead participants in Koranic recitation. Other cities could open meetings with Catholic mass or evangelical prayer meetings; petitioner's standard suggests no limit on length. And followers of Fred Phelps could open government meetings by denouncing homosexuality as a sin against God. *Cf. Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

Petitioner does not suggest that the rules would be different when the prayers are delivered by governmental officials themselves. One council member could offer Muslim prayers; another could read from the Book of Common Prayer; and a third could lead citizens in reciting the Lord's Prayer. *Cf. Mullin v. Sussex Cnty.*, 861 F. Supp. 2d 411 (D. Del. 2012) (issuing preliminary injunction against that practice).

Under petitioner's approach, no pressure short of legal sanctions counts as coercion (Pet. Br. 36), so guest chaplains and government officials would be free to browbeat citizens to participate in all of these prayers, provided that no formal penalties were imposed.

Petitioner would apply its anything-goes regime to all three branches of government, without regard to context. Pet. Br. 30-35. All local bodies could pray—even zoning boards and school boards—as long as no legal sanctions were imposed on resisters. *But see Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011) (*Marsh* inapplicable to school boards); *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999) (same). Courts could open with Christian prayer. Pet. Br. 34. *But see N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1150-53 (4th Cir. 1991) (holding even nonsectarian judge-delivered prayers unconstitutional). Committee hearings, naturalization ceremonies, and agency rate-making proceedings could likewise begin with sectarian prayer. Petitioner is no longer arguing that legislative prayer is a special case; it is arguing that government may sponsor explicitly Christian prayer in any and all contexts.

This is not just a lawyer's parade of horribles based on the logical implications of an opposing argument. At a recent utility-rate hearing in Alabama, all present were asked to stand, and the invited prayer-giver asked for a show of hands on who believed in prayer. He then led a nearly four-minute prayer, proclaiming:

> God, we've taken you out of our schools, we've taken you out of our prayers, we've murdered

> your children, we've said it's okay to have same-sex marriage, God. We have sinned. And we ask once again that you'll forgive us for our sins. * * * I ask in the powerful, the most mighty name, the name that's above all names, and that's Jesus. Everybody say it, "Amen."

See Alabama Government Agency Begins Meeting With Anti-Gay Marriage Prayer, http://tinyurl.com/rate-hearing-prayer; *PSC Won't Abandon Prayer*, Montgomery Advertiser, Aug. 3, 2013, at A1, *available at* 2013 WLNR 19128932. Petitioner's test would allow the Greece Town Board, and any other governmental meeting, to open the same way.

CONCLUSION

The judgment should be affirmed and the case remanded for implementation of an effective remedy.

Respectfully submitted,

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APPENDIX

INSTRUCTIONS FOR GUEST CHAPLAINS IN THE U.S. HOUSE OF REPRESENTATIVES

ON THE DAY AS GUEST CHAPLAIN

The guest chaplain should arrive at the sponsoring Member's congressional office by 11:15 a.m. (or 45 minutes before the prayer is scheduled). The time of the prayer is listed in the confirmation letter. It is usually 12:00 noon.

The guest chaplain and his/her family or guests will be escorted to the Capitol to meet the Chaplain in the Speaker's Lobby by 11:45 am (or 15 minutes before the prayer). At that time, the guest chaplain will be given instructions for offering the prayer while family members are escorted to the House Gallery to watch the proceedings.

Following the prayer, if arranged by the congressional office, the Member will give a one-minute speech to honor the guest chaplain and then a picture will be taken in a room off the House Floor commemorating the event. This concludes the guest chaplain duties for the day. The sponsoring Member's office can arrange for a Capitol tour, if requested. Guest chaplains are also reminded that their prayer will be shown live on C-SPAN if family and friends at home would like to watch.

CONCERNING THE OPENING PRAYER

The guest chaplain should keep in mind that the House of Representatives is comprised of Members of many different faith traditions.

The length of the prayer should not exceed 150 words.

The prayer must be free from personal political views or partisan politics, from sectarian controversies, and from any intimations pertaining to foreign or domestic policy.

It must be given exclusively and in its entirety in the English language.

It must be free from references to the national day observances of any other nation.

The prayer must be submitted at least one week ahead of time for incorporation in the Congressional Record.

When introduced by the Speaker for the prayer, the guest chaplain ***should not*** make any introductory remarks, but rather just begin the prayer.

ARRIVAL IN WASHINGTON

The guest chaplain should plan to be in Washington the evening prior to his/her appearance in the House and should provide the Chaplain's office with a local telephone number where they can be reached in case of last minute changes. A list of hotels closest to the Capitol is enclosed.

If we are provided with the vehicle information ahead of time, the guest chaplain will be cleared to park on the Capitol Drive, located at the south entrance of the Capitol at Independence Ave. and New Jersey Ave. SE.

No funds are provided for gratuity or expenses.

REPLY BRIEF

No. 12-696

IN THE
Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

REPLY BRIEF FOR PETITIONER

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding and Rule 29.6 statement included in the Brief for Petitioner remain accurate.

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REPLY BRIEF FOR PETITIONER

Respondents concede that municipalities like the Town of Greece can start their deliberative sessions with a prayer without violating the Establishment Clause. Resp. Br. 48. And respondents effectively abandon the legal theory that they persuaded the court of appeals to adopt—that the Town impermissibly "aligned" itself with or "endorsed" Christianity by offering a prayer opportunity at the start of each legislative session. Pet. App. 8a-9a, 23a; Resp. C.A. Br. 21, 35-48.

Evidently unwilling to defend the Second Circuit's decision on its own terms, respondents now assert that they should prevail either because the Town (1) "puts coercive pressure on citizens to participate in the prayers," or (2) permits prayer-givers to use "sectarian" references. Resp. Br. 17. Neither argument has merit.

First, no court has ever held that the mere existence of a prayer opportunity at a deliberative meeting impermissibly coerces citizens to participate. To the contrary, this Court has repeatedly concluded that adults are not readily susceptible to such "'religious indoctrination'" or "peer pressure." *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (citation omitted); *see also Lee v. Weisman*, 505 U.S. 577, 597 (1992). Nor has this Court ever suggested that children are susceptible to such coercion outside the public education setting. *Lee*, 505 U.S. at 597.

Respondents' eleventh-hour embrace of the coercion test is understandable, as is their attempt to twist that test beyond all recognition. Properly defined, a coercion test is consistent with both *Marsh* and an accurate understanding of the Religion

Clauses. Pet. Br. 35-40. But there is no basis in law or lexicography for respondents' infinitely expansive and elastic concept of coercion, whereby citizens who voluntarily attend Board meetings and observe an invocation with which they disagree can claim to be "coerced . . . to participate in the prayers." Resp. Br. 15.

Nor did respondents proffer any evidence suggesting that they or any other Town residents were compelled or pressured into attending Board meetings or participating in prayer. To the contrary, the record refutes any such claim. Respondents attend Board meetings at will, refuse to bow their heads or stand when invocations are offered, and have forcefully stated their opinions about the wisdom of legislative prayer and other matters of Town business during the meeting's public comment period. Pet. App. 7a-8a; C.A. App. A1067-69, A1085. Simply put, respondents have not been coerced. And respondents lack standing to assert the speculative purported injuries of other Town residents whom they now allege (without evidence) have been coerced.

Second, the claim that faith-specific references in prayers violate the Establishment Clause is irreconcilable with *Marsh* and with the history of legislative prayer in this country. Under *Marsh*, legislative prayer is presumptively constitutional, and the content of specific prayers is of no concern to courts unless the government exploits the opportunity to proselytize, advance, or disparage a particular religion. Thus, invocations since the Founding have regularly included references to specific faith traditions, without leading to or threatening an establishment of religion. *See, e.g.*, U.S. Br. 18.

Ultimately, respondents' theories are hopelessly conflicted. On the one hand, they argue that coercive prayer violates the Constitution and that all prayer at Board meetings is "inherent[ly]" coercive. Resp. Br. 48. Yet they concede that so-called "nonsectarian" prayer is constitutional, despite its supposedly coercive effects. *See id.* at 48-49. Thus, under respondents' theory, the Establishment Clause permits government to "coerce" atheists by offering prayers to God, but prohibits prayers that refer to Jesus because they would purportedly "coerce" persons of non-Christian faiths. That cannot be the law.

The court of appeals' analysis is fatally flawed, as confirmed by respondents' failure to defend it, but respondents cannot rescue the judgment below by substituting dangerously overbroad and mutually irreconcilable constitutional theories. This Court should reverse the court of appeals and reaffirm that "opening . . . sessions of legislative and other deliberative public bodies with prayer" is consistent with the Establishment Clause. *Marsh*, 463 U.S. at 786.

ARGUMENT

I. THE TOWN OF GREECE'S PRAYER PRACTICE IS CONSTITUTIONAL UNDER *MARSH V. CHAMBERS*.

Respondents concede that "some form of prayer will be allowed at meetings of local legislative bodies," and they "have not, at any point in this litigation, asked that they be eliminated altogether." Resp. Br. 48. And respondents make practically no effort to defend the court of appeals' application of an "endorsement" or "reasonable observer" test in the legislative-prayer context. Thus, unless respondents can distinguish *Marsh v. Chambers*, which upheld the Nebraska legislature's practice of starting delib-

erative sessions with a prayer, the Town must prevail.

Respondents cannot evade *Marsh*. First, respondents err in contending that *Marsh* did not address the possibility that legislative prayer could be psychologically coercive. Resp. Br. 41-43. Senator Chambers testified that he felt "pressure" to stand during prayers when he was "caught" in the chamber as a prayer was offered. Joint Appendix, *Marsh*, 463 U.S. 783 (No. 82-83), 1982 U.S. S. Ct. Briefs LEXIS 915, at *22. But *Marsh* rejected the argument that Chambers was impermissibly coerced, noting that "the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination'" or "peer pressure." 463 U.S. at 792 (citations omitted).

Respondents resist this conclusion because *Marsh* involved a challenge by a state legislator rather than a member of the general public. Resp. Br. 42-43. But that distinction did not matter in *Marsh* and should not matter here. In *Marsh*, Senator Chambers brought suit both as a state legislator and as a non-Christian taxpayer and citizen of the State of Nebraska. *Chambers v. Marsh*, 675 F.2d 228, 231 (8th Cir. 1982). This Court assigned no special importance to his status as a legislator. *Marsh*, 463 U.S. at 793-95. And there is no principled reason why resolving a claim of religious coercion should turn on whether or not the claimant is a government official, elected or otherwise.

Moreover, respondents' claim that state legislators have more freedom than average citizens to absent themselves from deliberative sessions cannot withstand scrutiny. In *Marsh*, "[l]egislative rules require[d] attendance at every session," but Chambers

nonetheless "excused himself on occasions during the prayers." 675 F.2d at 231 n.5. By contrast, the Town of Greece has no rule requiring that any citizen attend its Board meetings, nor does it prohibit any citizen from being absent for parts of the meeting. The meeting is visible through large glass windows in the entry doors, and attendees routinely enter and leave at will. *See, e.g.*, Pls.' C.A. Exs. 820, 821, 824, 825. If it is not impermissibly coercive under *Marsh* for a State to require a legislator to choose between hearing a paid chaplain's invocation or leaving the chamber in violation of procedural rules, it cannot be coercive to offer a prayer opportunity at a municipal meeting that has no audience attendance requirement.

Second, respondents argue that *Marsh* is distinguishable because the prayers in that case were allegedly "nonsectarian," rather than "explicitly Christian." Resp. Br. 44. Respondents' sole support for this argument is a single footnote in the majority opinion noting that after litigation had commenced, Reverend Palmer "removed all references to Christ" in his prayers. 463 U.S. at 793 n.14. This footnote cannot bear the weight assigned to it. Nothing in the Court's analysis turned on it, and the actual reasoning and record in *Marsh* refute the conclusion that this Court permitted only "nonsectarian" prayer practices as respondents define it. *See* Pet. Br. 25-26; *see also* Amicus Br. of Rev. Dr. Robert E. Palmer 6-17.[1]

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[1] Respondents seemingly use the term "sectarian" broadly to mean all faith-specific or nongeneric religious references. But the term more naturally relates to a single denomination within a broader religious tradition, *see Webster's Third New International Dictionary* 2052 (1976) (definitions 1a-b of "sect"), and it

Instead, *Marsh* affirmed the original understanding of the Establishment Clause with respect to legislative prayer. Specifically, the Framers dismissed the objection that the people "'were so divided in religious sentiments'" that no legislative prayer should be offered. 463 U.S. at 791 (citation omitted). Rather, Samuel Adams's view prevailed that regardless of religious persuasion, Americans could "'hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country.'" *Id.* at 792 (citation omitted). Accordingly, this Court concluded that, absent exploitation of the prayer opportunity, "[t]he content of the prayer is not of concern to judges" and courts should not "embark on a sensitive evaluation" or "parse the content of a particular prayer." *Id.* at 794-95.

Marsh, in other words, *presupposed* that legislative invocations would reflect the diverse faith-specific beliefs of different prayer-givers and that not everyone within earshot would agree with the prayers' content. But the Court refused to intervene to police that religious diversity, absent evidence that the government had exploited the prayer opportunity to proselytize, advance, or denigrate other religions. Therefore, this Court upheld Nebraska's "unbroken practice" for "more than a century" of opening its sessions with a prayer, which provided "abundant assurance that there is no real [Establishment Clause] threat." *Id.* at 795. The Court could not have relied on a century of tradition as evidence in

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has also historically been used as an anti-Catholic pejorative. *See Mitchell v. Helms*, 530 U.S. 793, 826-29 (2000) (plurality op.). These definitional problems illustrate why courts are ill-suited to draw or administer a distinction between "sectarian" and "nonsectarian" prayer. *See infra* at 21-22.

favor of the practice's constitutionality if the only thing that mattered was that Reverend Palmer had "removed all references to Christ the year after the suit was filed." *Van Orden v. Perry*, 545 U.S. 677, 688 n.8 (2005) (plurality op.).[2]

Respondents' unduly narrow reading of *Marsh* also cannot be reconciled with the well-established principle that voluntary cessation of an allegedly unconstitutional practice cannot save it from invalidation. *See* Pet. Br. 26. As respondents recognized below, "[w]hen a defendant voluntarily changes its behavior in response to litigation, the court *must* still examine the original policy." Resp. C.A. Br. 44 (emphasis added). And contrary to respondents' suggestion here (Resp. Br. 45-46), Senator Chambers expressly argued to this Court that Reverend Palmer's removal of references to Christ was immaterial. *See* Brief for Respondent, *Marsh*, 463 U.S. 783 (No. 82-83), 1983 U.S. S. Ct. Briefs LEXIS 1437, at *38 & n.17. If prayers using faith-specific terminology were really forbidden by *Marsh*, Senator Chambers would have prevailed.

Respondents also attempt to derive a "nonsectarian" test from the *Marsh* Court's pronouncement that the prayer opportunity cannot be "exploited to proselytize or advance any one, or to disparage any other, faith or belief." Resp. Br. 46 (citation omitted). Under respondents' view, faith-specific references in prayers necessarily advance one religion. But as the Tenth Circuit has observed, "all prayers 'advance' a

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[2] Contrary to respondents' suggestion (Resp. Br. 47), footnote 8 in *Van Orden* confirms that the *Marsh* Court upheld Nebraska's prayer practice *notwithstanding* that many of the prayers contained "explicitly Christian" references. 545 U.S. at 688 n.8 (plurality op.).

particular faith or belief in one way or another," because the "act of praying to a supreme power assumes the existence of that supreme power." *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 n.10 (10th Cir. 1998) (en banc). Thus, "the mere fact [that] a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause." *Id.*

Further, in light of *Marsh*'s refusal to parse the text of particular prayers and its holding that explicitly Christian prayers are constitutional, the Court's use of the word "advance" must require something more than mere inclusion of faith-specific language. In context, it must instead be understood as prohibiting activities that are comparable to attempts to proselytize, or to "convert from one religion, belief, opinion, or party to another." *Webster's Third New International Dictionary* 1821 (1976) (definition of "proselytize" or "proselyte"). At minimum, impermissible efforts to "advance" religion must, like direct attempts at conversion, "benefi[t] religion in a way more direct and more substantial than practices that are accepted in our national heritage." *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 662-63 (1989) (Kennedy, J., concurring in part and dissenting in part). By allowing a nondiscriminatory prayer opportunity, the Town has not "plac[ed its] official seal of approval on one religious view." U.S. Br. 12 (internal quotation marks omitted).

In short, *Marsh* controls this case, and respondents cannot distinguish it. For that reason alone, the court of appeals' decision should be reversed.

II. THE TOWN DID NOT COERCE RESPONDENTS OR ANYONE ELSE INTO PARTICIPATING IN ANY INVOCATION.

Unable to distinguish *Marsh*, and unwilling to defend the court of appeals' endorsement test, respondents devote much of their brief to the assertion (barely mentioned in their papers below) that they were coerced into participating in the prayers offered at the start of Board meetings. Resp. Br. 1, 17, 20-32. As the Town has shown, the coercion test enunciated in Justice Kennedy's opinion in *Allegheny* is consistent with *Marsh* and expresses a proper understanding of the Religion Clauses. Pet. Br. 38-40. But respondents' claim that they or others were coerced to participate in invocations offered by fellow Town residents has no support in either the record or the law.

Respondents thus lack standing to assert their coercion claim, and could not prevail without radically expanding the concept of coercion far beyond anything this Court has recognized. *Marsh* and kindred cases resolve this issue in the Town's favor: An adult is not coerced in any cognizable way by observing an invocation with which he or she disagrees. *See Marsh*, 463 U.S. at 791-92.

1. Under this Court's precedents, the Religion Clauses "forestal[l] compulsion *by law* of the acceptance of any creed or the practice of any form of worship." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (emphasis added). Thus, this Court has invalidated government actions that compel religious adherence by operation of law or threat of penalty, such as coercing students into attending religion classes, *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71, Champaign Cnty.*, 333 U.S. 203 (1948), or re-

quiring religious oaths to obtain government offices or benefits. *Torcaso v. Watkins*, 367 U.S. 488 (1961). But respondents' test would expand the concept of coercion to situations where adults are mere passive observers of religious activities performed by others.

This Court has never embraced such a broad concept of psychic coercion. To the contrary, the general rule under the Establishment Clause is that "psychological consequence presumably produced by conduct with which one disagrees . is not an injury sufficient to confer standing under Art. III." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). This limitation on standing is consistent with this Court's broader First Amendment jurisprudence, which presupposes that citizens in our democracy will sometimes be exposed to speech that they find disagreeable or even offensive. *See, e.g., Cohen v. California*, 403 U.S. 15, 21 (1971).

Respondents argue that "'subtle and indirect'" peer pressure or the mere "'perception'" of such pressure is coercive under the Establishment Clause. Resp. Br. 21, 25 (quoting *Lee*, 505 U.S. at 593). Not so. While this Court has expressed such concerns about prayers in "the classroom setting" and analogous school contexts where the "risk of compulsion is especially high," those precedents have taken pains to distinguish the school environment from other settings where that risk is absent. *Lee*, 505 U.S. at 596; *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311-12 (2000).

In *Marsh* itself, the Court rejected any potential coercion challenge to Nebraska's prayer practice. *See supra* at 4-5. In so holding, the Court relied on *Colorado v. Treasurer & Receiver General*, 392 N.E.2d

1195, 1200 (Mass. 1979), which contrasted the school setting, whose "purpose . . . is to teach impressionable children," with a legislature, where participants and observers "may reasonably be assumed to have fully formed their own religious beliefs or nonbeliefs."

Lee, in turn, noted that "[t]he atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event [*i.e.*, graduation] most important for the student to attend." 505 U.S. at 597. In invalidating a commencement invocation, this Court noted that "[t]he influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*." *Id.* But outside the unique educational context, it is simply not the case that "every state action implicating religion is invalid if one or a few citizens find it offensive." *Id.* To the contrary, "sometimes to endure social isolation or even anger may be the price of conscience or . . nonconformity." *Id.* at 597-98.[3]

To expand the reasoning in cases like *Lee* and *Santa Fe* to situations outside of the school setting would not only be unprecedented, but would call into question long-standing practices—such as the invocation "God save the United States and this Honorable Court" and the recitation of the Pledge of Alle-

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[3] Indeed, respondents themselves acknowledged before the district court that, "of course, it mattered greatly in *Marsh* that the audience for the legislative invocations consisted of adult[s], . rather than impressionable schoolchildren." Pls.' Mem. in Support of Mot. Summ. J. at 15, Dkt. 6:08-cv-06088 (W.D.N.Y. Jan. 20, 2009) (internal quotation marks omitted).

giance, with its words "under God," at state or municipal meetings. *Cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Under respondents' view, the Pledge would be impermissible, compelled religious speech because the person leading the Pledge "requests or assumes everyone's participation" and "asks those assembled to stand," and the "social conventions of our people" require that audience members place their hands over their hearts and recite the words. Resp. Br. 29-30. If anything, the Pledge is far more participatory, and under respondents' theory more coercive, than a legislative invocation because people are expected to join in reciting the Pledge.

This Court should not adopt a test that eviscerates any legal distinction between the scholastic and legislative settings and presumes that mature citizens are so delicate that they cannot resist participating in prayers with which they disagree.

2. Even assuming that the test for coercion were as expansive as respondents claim, the record is completely devoid of evidence that anyone was coerced—psychologically or otherwise—into participating in prayer.

To the contrary, there is ample record evidence *refuting* any claim of coercion. Respondents regularly and voluntarily attend Board meetings without incident. Pet. App. 7a-8a. Though respondents assert that "few would have the fortitude to disregard a chaplain's instruction" (Resp. Br. 23), respondents declined to follow the very requests they now claim are coercive. *See* C.A. App. A1067-69 (respondent remained seated after a prayer-giver asked that persons stand), A1085 (respondent refrained from bowing her head). Respondents also publicly expressed

their disagreement with the prayer practice and raised other issues of concern to them during the public forum following the invocation. *See, e.g.*, J.A. 115a-17a; C.A. App. A1067, A1069. Thus, respondents have not been prevented from attending or speaking at the meetings, and their mere passive exposure to an opening invocation does not amount to forced participation in prayer. *See, e.g., Allegheny*, 492 U.S. at 662 (Kennedy, J.). They simply have not suffered the type of alleged injury they now purport to make the centerpiece of their case.[4]

Respondents seek to bolster their argument by alleging that *other* Town citizens have been coerced to observe prayers because they must attend meetings to receive honors or to seek zoning variances. But respondents have no standing to challenge the perceived coercion supposedly experienced by unrelated third parties. *See Valley Forge*, 454 U.S. at 486-87 n.22; *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n.9 (1963).

Even if such parties were properly before the Court, the record does not support the conclusion that anyone present at the Board meetings was coerced to participate in any prayer. Indeed, despite

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[4] Although respondents contend that "participation" in Board meetings is "a universal right of citizenship," Resp. Br. 22, New York law does not require that municipalities allow for public comment. All that is required is that Board meetings—like sessions of Congress—be publicly observable. N.Y. Pub. Off. Law §§ 100-11. There is no justification for forcing legislatures to sacrifice the long-standing tradition of legislative prayer simply because they decide to allow direct public comment. Respondents' suggestion (Resp. Br. 21) that the public-comment right undercuts the legitimacy of the prayer practice would lead to the perverse result that municipalities could start their legislative sessions with a prayer if only they silenced their citizens.

ample opportunity to do so, respondents adduced no evidence before the district court that anyone (whether police officers, Boy Scouts, or others) was even required to attend the Board meetings, let alone be physically present during the prayer. Nor is the handful of social science articles cited by respondents competent evidence that they or other Town citizens were coerced into participating in prayer. *See* Resp. Br. 25-26 & nn.7-10. Respondents did not offer such evidence in the summary judgment record or provide the Town with any opportunity to rebut it. It is far too late to attempt to cure deficiencies in the record with armchair psychology.

There is also no evidence to suggest that any Town citizen felt coerced to participate in an invocation by the hypothetical and purely speculative fear that the Board might respond to nonparticipation by denying that citizen's application at a public hearing. To the contrary, public hearings (where such matters as zoning applications are considered) (Resp. Br. 5-6) are *not the same event* as the Board meeting where the invocation takes place. By law, the public hearing is noticed for a distinct, pre-announced, fixed time, typically 30 minutes or more after the invocation. N.Y. Town Law § 274-b; Town of Greece Code § 211-60; *see also* C.A. App. A929. And the public hearing itself does not start with an invocation. *See*, *e.g.*, Pls.' C.A. Exs. 733, 738, 779, 795, 829. Any potential applicant could easily time his or her arrival to avoid the invocation simply by showing up at the specified time for the public hearing.

Moreover, a citizen's mere subjective belief that he or she would receive unfavorable treatment as a result of not attending the prayer is insufficient to demonstrate an Establishment Clause violation under *Marsh*. If such fears were enough, respondents

would be immunized from establishing that the government exploited the prayer opportunity—the evidentiary showing required by *Marsh*. Respondents' proposed test would instead presuppose bad faith and discriminatory intent merely because the government provided a nondiscriminatory prayer opportunity. Indeed, respondents' concept of coercion is even more erroneous and pernicious than the court of appeals' endorsement test. It would replace a "reasonable observer," aware of the "history and context" of the long-standing practice of legislative prayer, with a paranoid observer who assumes government malfeasance in the absence of supporting evidence. *Cf. Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001). That is not the law.

3. Perhaps aware of the unprecedented scope of their coercion argument and the lack of record support for it, respondents argue that the Town's prayer practice is unconstitutional because children sometimes attend Board meetings to receive awards. But again, respondents have no standing to challenge the perceived coercion purportedly experienced by underage attendees. *See supra* at 10, 13.

The court of appeals correctly rejected respondents' attempt to shoehorn this case into the *Lee* framework; as even respondents concede, "there is no reason to believe that children are any more present in [Greece] Board meetings than they were in meetings of the Nebraska legislature." Br. in Opp. 18 n.5 (quoting Pet. App. 23a-24a n.8). To the contrary, a review of the "Visitors" entries in the Nebraska Unicameral's 1979 Legislative Journal (the year the *Marsh* suit was filed) shows that children visited the chamber during at least 64 of 89 legislative days—over 70% of all meetings. *See* 1 Legislative Journal of the State of Nebraska, 86th Leg., 1st Sess. (1979),

available at http://nebraskalegislature.gov/FloorDocs/86/PDF/Journal/r1journal.pdf. Nor are children mere passive spectators at the state level. Rather, children routinely participate and receive honors and recognition at state legislative sessions. *See, e.g.*, New Hampshire, Senate Journal, 163d Sess., 306 (May 23, 2013), *available at* http://www.gencourt.state.nh.us/scaljourns/journals/2013/SJ%2012.pdf; 139 Rhode Island, Journal of the House of Representatives, No. 6, at 1 (Jan. 12, 2012), *available at* http://webserver.rilin.state.ri.us/Journals12/HouseJournals12/HJournal1-12.pdf. In this regard, practice at the municipal level cannot be distinguished.

Nor can respondents prevail under *Lee* merely by noting that children sometimes attend Board meetings to satisfy a civics requirement. Resp. Br. 22. The high school students to whom respondents refer can fulfill that requirement by attending any number of government functions, including library meetings, court sessions, and zoning hearings. *See* C.A. App. A929, A1038-39. No student is required to attend a Town Board meeting. Moreover, state and local legislative meetings are far different from school functions, as they are not focused on the instruction or indoctrination of young people. This Court has never suggested that the "'particular concerns that arise in the context of public elementary and secondary schools' . . . would extend to a legislative chamber." *Van Orden*, 545 U.S. at 691 (plurality op.) (citation omitted).

4. Respondents argue that application of the traditional coercion test (as opposed to their vastly expanded approach) would open the floodgates for government officials to "admonish, harangue, and intimidate citizens to participate in prayers." Resp.

Br. 31. That, too, is incorrect. If a government actor responsible for providing benefits to a citizen attempted to "browbeat" that citizen into praying (*id.* at 19, 60), the courts would properly conclude that such activity was impermissibly coercive and thus improper exploitation under *Marsh*. Similarly, respondents' examples of a parole officer or caseworker preaching conversion or demanding attendance at church would plainly constitute coercion. Moreover, the Town's volunteer prayer-givers do not stand in the same position as a parole officer; the prayer-givers are private citizens and cannot offer or deny benefits to any meeting attendee. And there is no evidence in the record that the invocations delivered at Board meetings "admonish, harangue, [or] intimidate citizens." *Id.* at 31; *see* Pet. App. 21a. Other examples, like opening a legislative session with a Catholic mass, have nothing to do with legislative invocation and would instead involve a full-fledged worship service that would unconstitutionally place "the government's weight behind an obvious effort to proselytize." *Allegheny*, 492 U.S. at 661 (opinion of Kennedy, J.).

Respondents point to one occasion on which a prayer-giver stated, in extemporaneous remarks preceding the actual invocation, that those who object to legislative prayer "are ignorant of the history of our country." J.A. 108a. That opinion on the wisdom of legislative prayer does not "advance or disparage" any faith or religion in the manner deemed problematic in *Marsh*; instead, it accurately describes the teaching of *Marsh* itself. Moreover, *Marsh* does not ensure that the citizenry will never be exposed to a single improvident prayer. Rather, under *Marsh*, the relevant test is whether the government has "exploited" the "*prayer opportunity*" to proselytize, ad-

vance, or disparage. 463 U.S. at 794-95 (emphasis added). The government action here consists of providing a forum for private citizens to deliver invocations according to the dictates of their own consciences, not in composing official prayers or dictating that prayer-givers must hold certain views.[5] While a pattern of disparaging invocations might demonstrate that the government is exploiting the prayer opportunity for an improper purpose, the Town should not be held accountable for the stray remarks of an individual prayer-giver.

III. RESPONDENTS' PROPOSED BAN ON "SECTARIAN" PRAYERS HAS NO BASIS IN ESTABLISHMENT CLAUSE JURISPRUDENCE AND WOULD BE UNWORKABLE IN PRACTICE.

Despite the claim that coercion is "inherent" in legislative invocations and "cannot be eliminated," respondents in the same breath concede that not all municipal prayer is unconstitutional, and suggest as a remedy that courts purge invocations of any "sectarian" content. Resp. Br. 48. These positions cannot be reconciled. If it were coercive for someone to observe an invocation with which he or she disagrees, it would not matter whether that prayer made

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[5] Indeed, censoring the prayers of private volunteers in such a forum would raise potentially serious free-speech concerns. The volunteer prayers in this case are unlike those given at the football games in *Santa Fe*, where the selection process prevented minority voices from being heard. 530 U.S. at 304. There is also no conflict between *Marsh*'s prohibition on exploitation of the prayer opportunity and prayer-givers' free speech rights. *See* Resp. Br. 57. Those prayer-givers who abuse the prayer opportunity could properly be excluded for using it for something other than its "intended purposes"—*i.e.*, to solemnize and ask guidance for the Board proceedings. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

reference to a generic deity or to a specific faith tradition. Indeed, that is the holding of *Lee v. Weisman*. Having all but abandoned the ill-conceived endorsement test adopted by the court of appeals, respondents have no basis for claiming that government establishment of religion turns on the content of particular prayers.

According to respondents, "sectarian" references in legislative prayers threaten government neutrality in matters of religious belief. Resp. Br. 32. That conclusion rests on an "untutored devotion to the concept of neutrality" of the sort that leads to "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Abington*, 374 U.S. at 306 (Goldberg, J., concurring). The principle of neutrality is certainly not threatened where, as here, the government makes a prayer opportunity available to citizens of any (or no) faith tradition. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002); *Good News Club*, 533 U.S. at 114.[6]

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[6] Respondents litter their brief with references to the Town's prayer-giver selection processes, despite having abandoned any argument that the Town discriminated against non-Christian prayer-givers. Pet. App. 10; Resp. Br. 37. That issue has been waived. In any event, the record does not support a "pattern [of] frequent reliance on a small number of repeat chaplains who would come whenever asked." Resp. Br. 36. As the court of appeals noted, the Town schedulers "worked their way down [a] list . . until they found someone willing to give the prayer." Pet. App. 5a. Only one of three schedulers who served from 1999 to 2008 testified that she would call a "couple of stand[by] people" in the event of cancellation. C.A. App. A905. And the record reflects that in her time as scheduler, there were at least seventeen different prayer-givers, and no one delivered the prayer more than three times. *See* Pet. App. 41a. The district court thus correctly discerned no "evidence that the Town excluded non-Christians for impermissible reasons." *Id.* at 78a.

Respondents' argument cannot be reconciled with *Marsh*, which ratified this country's long history of invocations that include references to specific religious traditions. The first prayer before the Continental Congress was expressly faith-specific, invoking "Jesus Christ, Thy Son and our Savior." Rev. Jacob Duché, First Prayer of the Continental Congress (Sept. 7, 1774), Office of the Chaplain: U.S. House of Representatives, http://chaplain.house.gov/archive/continental.html. The country's first Thanksgiving Proclamation was likewise faith-specific and encouraged citizens to "humble and earnest supplication that it may please God, through the merits of Jesus Christ." 9 Journals of the Continental Congress, 1774-1789, at 855 (Worthington Chauncey Ford ed., 1907).

Faith-specific prayer remains a consistent feature of our country's legislative prayer practice today. From "'[the] earliest days to the present times, the prayers delivered by [legislative] chaplains have been true sacral prayers, and [often] true Christian prayers.'" *Rubin v. City of Lancaster*, 710 F.3d 1087, 1093-94 (9th Cir. 2013) (second alteration in original) (quoting Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2104 (1996)). For example, in the six years between 1990 and 1996, "over two hundred and fifty opening prayers delivered by congressional chaplains . . . included supplications to Jesus Christ." *Id.* at 1094 (internal quotation marks omitted). Of the 304 prayers offered during the 112th Congress, a majority contained identifiably Christian content. Cert.-Stage Amicus Br. of Members of Congress 20; *see also* U.S. Br. 20; Amicus Br. of U.S. Senators 12-13, 16-17.

Moreover, it would be unprecedented and dangerous for this Court to attempt to draw and police a line between "sectarian" and "nonsectarian" prayer, however defined. In *Lee*, the Court declined to make the constitutional test turn on whether or not prayers "make[] explicit references to the God of Israel, or to Jesus Christ, or to a patron saint." *Lee*, 505 U.S. at 589. The Court concluded that "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Id.* Rather, the "suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds" is "a contradiction that cannot be accepted." *Id.* at 590.

A constitutional test that turns on a "sectarian"/"nonsectarian" divide would be impossible to administer. As Justice Souter observed, there is hardly a task "less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible" than the task of distinguishing the "sectarian" from the "nonsectarian." *Lee*, 505 U.S. at 616-17 (Souter, J., concurring); *see also* Amicus Br. of Dr. Daniel L. Akin 1; Amicus Br. of Jewish Social Policy Action Network 6. It is no surprise that the lower courts have generally refused to draw a constitutional line between "sectarian" and "nonsectarian" prayer. *See Rubin*, 710 F.3d at 1100; *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1272 (11th Cir. 2008).

Respondents attempt to avoid these problems by asking the Court to rule that only "[o]bviously sectarian" references are unconstitutional. Resp. Br. 50-52. This argument is fatally flawed for at least two reasons.

First, respondents' view of what constitutes "obviously sectarian" references would disfavor religions (like Christianity) whose specific theological references are easier for courts to identify and expunge.

Second, once the Court decreed certain "obviously sectarian" references out of bounds, it is a virtual certainty that the courts would immediately become embroiled in more difficult cases that "invite the courts to engage in comparative theology." *Lee*, 505 U.S. at 616 (Souter, J., concurring). This is not difficult to imagine. For example, respondents declare that references to Allah are easily classified as "sectarian." Resp. Br. 53. But at least one court has reached the opposite conclusion. *Hinrichs v. Bosma*, No. 05-813, 2005 WL 3544300, at *7 (S.D. Ind. Dec. 28, 2005). And one of the respondents was unsure of the answer herself at her deposition. Pet. App. 45a.

Courts fashioning remedies in such cases would assume the role of official censor, framing injunctions that prohibit prayer-givers from using terms like "Messiah," "Allah," "Buddha," or "Father" based on the court's subjective perception of what constitutes "sectarian" content. Simply put, the judiciary is not suited for such a task, nor do our constitutional traditions allow it.

If respondents' "nonsectarian" test were to become the law, countless deliberative bodies in this country—from both houses of Congress, to all fifty state legislatures, to innumerable counties and municipalities—would have their prayer practices subjected to intricate judicial regulation and wordsmithing. Such an outcome would "lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions," and "could thereby create the very kind of religiously based divisiveness

that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment). This Court should decline respondents' invitation. It should instead reaffirm *Marsh* and uphold the Town's prayer practice as consistent with the unbroken history of legislative prayer since the Founding.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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October 22, 2013

AMICUS CURIAE BRIEF

No. 12-696

In the Supreme Court of the United States

TOWN OF GREECE, NEW YORK, PETITIONER

v.

SUSAN GALLOWAY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether, under this Court's decision in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), a court's review under the Establishment Clause of a legislature's practice of providing for the delivery of a prayer at the beginning of a session is properly limited to assuring that the practice is not exploited to proselytize or advance any one, or disparage any other, faith or belief.

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In the Supreme Court of the United States

No. 12-696

TOWN OF GREECE, NEW YORK, PETITIONER

v.

SUSAN GALLOWAY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 681 F.3d 20. The order of the district court (Pet. App. 28a-131a) is reported at 732 F. Supp. 2d 195.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2012. A petition for rehearing was denied on August 8, 2012 (Pet. App. 132a-133a). On October 17, 2012, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including December 6, 2012, and the petition was filed on that date. The petition was granted on May 20, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

INTEREST OF THE UNITED STATES

Throughout its history, and dating back to the first session of the Continental Congress in 1774, the United States Congress has appointed Chaplains to open each legislative day with a prayer. When the First Congress met in 1789, among its first orders of business was to select Chaplains for the House of Representatives and Senate. Today, both the House and Senate Rules require that each legislative day begin with a prayer from the House or Senate Chaplain or from a guest. *Rules of the United States House of Representatives*, Rules II.5, XIV.1; *Rules of the United States Senate*, Rule IV.1(a). The United States participated as amicus curiae in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), in which this Court upheld the Nebraska State Legislature's practice of employing a chaplain who opened every legislative session with prayer, and has participated as a party in numerous cases concerning the constitutionality of opening legislative prayers in the United States Senate and House of Representatives. See *Kurtz* v. *Baker*, 829 F.2d 1133 (D.C. Cir. 1987), cert. denied, 486 U.S. 1059 (1988); *Murray* v. *Buchanan*, 720 F.2d 689 (D.C. Cir. 1983); *Newdow* v. *Eagen*, 309 F. Supp. 2d 29 (D.D.C. 2004).

STATEMENT

1. The Town of Greece is a municipal corporation located in Monroe County, New York. Pet. App. 3a. As of the 2000 census, the town had approximately 94,000 residents. *Ibid.* The five-member Town Board is elected to govern the town and conducts official business at monthly public meetings. *Ibid.* Before 1999, the Board opened its meetings with a moment of silence. *Ibid.* In 1999, the Town Supervisor implemented a practice of inviting local clergy to offer an opening prayer at each Town Board meeting. *Ibid.* The Town lists the prayer

in each meeting's official minutes, but it does not review the language of any prayer before it is delivered and does not censor any prayer for content. *Id.* at 3a-4a, 29a-30a.

As of 2010, when the factual record in this case closed, the Town Board had not adopted a written policy governing its selection of prayer-givers or any other aspect of its opening prayer practice. Pet. App. 4a. But as a matter of practice, an employee in the Town's Office of Constituent Services has invited local clergy to deliver opening prayers. *Id.* at 5a. Initially, the town employee solicited clergy by telephoning all the religious organizations that were listed in the Town's Community Guide, which is published by the Greece Chamber of Commerce. *Ibid.* The employee later compiled a "Town Board Chaplain" list of individuals who had accepted invitations to give prayers. *Ibid.* That employee and her successors thereafter selected guest chaplains by calling individuals on the list approximately a week before each meeting until they found someone willing to deliver a prayer. *Ibid.* Until 2008, the list included only Christian congregations and clergy. *Ibid.* Nearly all of the religious congregations located within petitioner's borders are Christian. *Id.* at 5a, 30a, 42a. A map introduced into evidence indicates that there is one Buddhist temple and one Jehovah's Witness church located in the Town's borders and that there are several Jewish congregations located just outside of its borders. *Id.* at 5a-6a, 30a-31a, 42a-43a. Nothing in the record indicates that any of those organizations was listed in the community guide. *Id.* at 6a. From 1999 through 2007, every individual who delivered a prayer at a Town Board meeting was Christian. *Id.* at 4a. Most of the prayers that were delivered at the Board's meetings contained

sectarian Christian references, including references to "Jesus," "Jesus Christ," "Your Son," the "Holy Spirit," or the Holy Trinity. *Id.* at 7a. Other prayers used more generically theistic terms such as "God of all creation" and "Heavenly Father." *Ibid.* The non-Christian prayer-givers included references to "God," "the Father," "Lord," "Alláh-u-Abhá" (which loosely translates as "God the All Glorious"), Athena, and Apollo. *Ibid.*; see *id.* at 44a.

Respondents are two residents of the Town of Greece who have attended Town Board meetings. See Pet. App. 7a-8a & n.2, 44a-47a. Respondent Stephens is an atheist and finds all legislative prayer to be offensive. *Id.* at 44a. Respondent Galloway similarly believes that prayer is inappropriate at government meetings and believes that, if legislative prayers are given, they should be non-sectarian. *Id.* at 45a-47a. In 2007, respondents began complaining to town officials about the Board's prayer practice, contending that the practice aligned the Board with Christianity. *Id.* at 8a. Town officials met with respondents and explained that the Board would accept any volunteer who wished to deliver a prayer and that the Board would not police the content of any prayer. *Ibid.* In 2008, non-Christian individuals delivered prayers at four of the twelve Town Board meetings. *Id.* at 4a. The prayer-givers included the chair of the nearby Baha'i congregation, a lay Jewish man, and a Wiccan priestess. *Ibid.* In 2009, Christian individuals again delivered all of the prayers. *Id.* at 5a.

2. In February 2008, respondents filed this suit against petitioner under 42 U.S.C. 1983, asserting that the Town's prayer practice violates the Establishment Clause because its selection process prefers Christianity over other faiths and because the content of the prayers

is impermissibly sectarian. Pet. App. 8a.[1] The district court granted summary judgment for petitioner. *Id.* at 28a-131a. The district court rejected respondents' challenge to petitioner's method of selecting prayer-givers for the Board's meetings, finding "no evidence that [petitioner] intentionally excluded non-Christians from giving prayers at Town Board meetings." *Id.* at 73a; see *id.* at 69a-78a.

Guided by this Court's decision in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), the district court also rejected respondents' argument that the sectarian content of many of the prayers violated the Establishment Clause. Pet. App. 79a-131a. The court considered "the nature of the prayers" that had been delivered and concluded that "they did not proselytize or advance any one, or disparage any other, faith or belief." *Id.* at 126a. The court explained that many of the prayers that respondents considered to be sectarian were "indistinguishable" from the prayers that respondents considered to be non-sectarian except for the fact that the prayers ended with the phrase "in Jesus' name." *Ibid.* The court rejected respondents' arguments that all sectarian legislative prayers violate the Establishment Clause and that petitioner was required to direct potential prayer-givers to deliver "inclusive ecumenical prayers." *Id.* at 127a; see *id.* at 127a-130a.

3. The court of appeals reversed. Pet. App. 1a-27a. The court acknowledged that "the touchstone of [the court's] analysis must be *Marsh*." *Id.* at 16a. Reading *Marsh* in light of this Court's subsequent cases, the court concluded that, although the Establishment

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[1] Respondents also sued the Town Supervisor, but the district court dismissed that claim as redundant of the claim against petitioner. Pet. App. 8a-9a.

Clause prohibits a legislative prayer practice that, "viewed in its entirety, * * * advance[s] a single religious sect," it does not prohibit "all legislative invocations that are denominational in nature." *Id.* at 14a-15a. The court of appeals stated that its role was to determine "whether the town, through its prayer practice, has established particular religious beliefs as the more acceptable ones, and others as less acceptable." *Id.* at 17a.[2]

Applying that inquiry to the "totality of circumstances presented in this case," the court of appeals concluded that "the town's prayer practice must be viewed as an endorsement of a particular religious viewpoint." Pet. App. 19a; see *id.* at 18a-26a. In the court's view, petitioner's "practice of inviting clergy almost exclusively from places of worship located within [petitioner's] borders" "virtually ensured" that "a Christian viewpoint" would be represented by prayer-givers. *Id.* at 19a. The court also noted "that most of the prayers at issue here contained uniquely Christian references." *Id.* at 20a. The court stated that "[t]he sectarian nature of the prayers * * * was not inherently a problem" and emphasized that "[t]he prayers in the record were not offensive in the way identified as problematic in *Marsh*," because they "did not preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like." *Id.* at 21a; see *Marsh*, 463 U.S. at 794-795 ("[T]he content of [legislative] prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.").

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[2] Respondents abandoned on appeal their claim that petitioner intentionally discriminated against non-Christians in its selection of prayer-givers. Pet. App. 10a.

Nevertheless, the court concluded that the sectarian content of many of the prayers, taken together, violated the Establishment Clause because "an objective, reasonable observer would believe that the town's prayer practice had the effect of affiliating the town with Christianity." Pet. App. 24a. In so holding, the court of appeals "ascribe[d] no religious animus to the town or its leaders," but faulted petitioner for failing to explain to the public "the nature of its prayer program" and failing to "inform[] prayer-givers that invocations were not to be 'exploited'" to proselytize or to disparage other religions. *Id.* at 22a.

The court of appeals concluded by noting that, although legislative prayers are not inherently unconstitutional, see Pet. App. 25a, municipalities may have considerable difficulty structuring a legislative prayer practice in a way that, in the court of appeals' view, avoids "the appearance of religious affiliation," *id.* at 26a. The court stated that "even a single circumstance may appear to suggest an affiliation" and acknowledged that, "[t]o the extent that the state cannot make demands regarding the content of legislative prayers, * * * municipalities have few means to forestall the prayer-giver who cannot resist the urge to proselytize." *Id.* at 27a; see *id.* at 24a-25a ("Nor can a municipality insulate itself from liability by adopting a lottery to select prayer-givers or by actively pursuing prayer-givers of minority faiths whose members reside within the town."). "These difficulties," the court of appeals cautioned, "may well prompt municipalities to pause and think carefully before adopting legislative prayer." *Id.* at 27a.

SUMMARY OF ARGUMENT

In *Marsh* v. *Chambers*, 463 U.S. 783 (1983), this Court held that a state legislature's practice of employ-

ing a chaplain to deliver prayers at the beginning of its legislative sessions does not violate the Establishment Clause. The Court's decision relied primarily on the history of legislative prayer in this country, which has existed without pause since the Continental Congress and was adopted as the official practice of the United States House of Representatives and Senate at the same time those bodies were drafting and approving the First Amendment. In light of that history, the Court concluded that a practice of legislative prayer that is not exploited to proselytize, to disparage any religion, or to advance any one faith or belief does not violate the Establishment Clause. The Court admonished that, in such circumstances, courts should not parse or evaluate the content of prayer, a warning the Court has reiterated in later cases.

The court of appeals erred in its application of *Marsh*. The court agreed with petitioner that petitioner's practice of providing for the offering of a prayer at the beginning of Town Board meetings has not been exploited to proselytize or to denigrate any faith; it also accepted the uncontested finding that petitioner did not intentionally favor any one faith over any other. The court of appeals nevertheless held that petitioner's practice violates the Establishment Clause because it has almost always resulted in participation by Christian prayer-givers, many of whom have employed identifiably Christian words in their prayers. In the court of appeals' view, a "reasonable observer" would therefore understand petitioner's prayer practice as an establishment of Christianity. That was error.

Under the principles announced in *Marsh*, which relied heavily on the history of legislative prayer in this country, a prayer practice that is not problematic in the

ways identified in *Marsh* (as petitioner's practice concededly is not) does not amount to an unconstitutional establishment of religion merely because most prayer-givers are Christian and many or most of their prayers contain sectarian references. The unbroken history of the offering of prayer in Congress, for example, has included a large majority of Christian prayer-givers and a substantial number of prayers with identifiably sectarian references. Neither federal courts nor legislative bodies are well suited to police the content of such prayers, and this Court has consistently disapproved of government interference in dictating the substance of prayers.

ARGUMENT

UNDER THIS COURT'S DECISION IN *MARSH*, LEGISLATIVE PRAYER WITH SECTARIAN CONTENT IS PERMISSIBLE IF IT DOES NOT PROSELYTIZE OR ADVANCE ANY ONE, OR DISPARAGE ANY OTHER, FAITH OR BELIEF

This Court's decision in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), established that the practice of providing an opportunity for a prayer at the beginning of a legislative body's day or session, when not exploited to proselytize, advance, or disparage any faith or belief does not violate the Establishment Clause. Although the court of appeals purported to apply *Marsh*, its view of what *Marsh* requires was erroneous. The court did not contest the district court's finding that the prayer practice at issue is not problematic in the ways proscribed by *Marsh*. But the court nevertheless based its decision in significant part on the sectarian content of the prayers that were delivered at Town Board meetings. Concluding that too many of the prayers contained Christian references, and that too many of the prayer-givers were Christian, the court of appeals held that petitioner's

practice violates the Establishment Clause. *Marsh*, however, calls for neither that type of inquiry into the content of prayers nor that type of court-ordered sectarian diversity. Because the court of appeals erred in applying *Marsh* to petitioner's challenged practice, reversal is warranted.

A. *Marsh* Neither Requires Nor Permits A Court To Parse The Sectarian Content Of Prayers Offered At The Opening Of The Session Of A Legislative Body

1. In *Marsh* v. *Chambers*, *supra*, the Court considered whether the Nebraska State Legislature's practice of paying a chaplain to open every legislative session with a prayer violated the Establishment Clause. Rather than apply the three-part test that had been articulated in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), the Court examined the history and practice of providing for such prayers in Congress and in state legislatures throughout the country. *Marsh*, 463 U.S. at 786-795. Finding that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country," the Court concluded that such a practice does not violate the Establishment Clause. *Id.* at 786, 792. This Court has since described the decision in *Marsh* as an exception, grounded in historical practice, to the Court's usual approach to Establishment Clause questions. See *McCreary Cnty.* v. *ACLU*, 545 U.S. 844, 859 n.10 (2005); *Edwards* v. *Aguillard*, 482 U.S. 578, 583 n.4 (1987); see also *Lee* v. *Weisman*, 505 U.S. 577, 603 n.4 (1992) (Blackmun, J., concurring); *Wallace* v. *Jaffree*, 472 U.S. 38, 63 (1985) (Powell, J., concurring).[3]

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[3] The Court has indicated on several occasions, including in *Marsh*, that certain other government invocations that include religious

In reaching its conclusion, the Court in *Marsh* noted that, "[f]rom colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of religious disestablishment and religious freedom." 463 U.S. at 786. Both the Continental Congress and the First Congress—which drafted and approved the First Amendment—adopted the practice of opening every day with a prayer delivered by a paid chaplain. *Id.* at 787-788. The Court recognized that, "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees"—but concluded that "there is far more here than simply historical patterns." *Id.* at 790. Relying on the First Congress's near simultaneous authorization of a paid legislative chaplain and adoption of the First Amendment, the Court reasoned that "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent." *Id.* at 788-790. In light of that history, the Court concluded that "the men who wrote the First

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references and have a similarly long history in this country—such as this Court's use of the phrase "God save the United States and this Honorable Court"—also do not violate the Establishment Clause. See *Marsh*, 463 U.S. at 786; *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952); see also *Van Orden* v. *Perry*, 545 U.S. 677, 716 (2005) (Stevens, J., dissenting); *McCreary Cnty.*, 545 U.S. at 886 (Scalia, J., dissenting); *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 29 (2004) (Rehnquist, C.J., concurring in judgment); *id.* at 37 (O'Connor, J., concurring in judgment); *County of Allegheny* v. *ACLU*, 492 U.S. 573, 672 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); *Wallace*, 472 U.S. at 84 (Burger, C.J., dissenting); *Lynch* v. *Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring); *id.* at 714 (Brennan, J., dissenting).

Amendment did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id.* at 788.

Significantly, the Court concluded that the Framers "did not consider opening prayers as a proselytizing activity or as symbolically placing the government's 'official seal of approval on one religious view,'" even when such prayers were consistently delivered by a single chaplain who was identified with a particular faith. *Marsh*, 463 U.S. at 792. The Court explained:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being."

Ibid. (quoting *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952)).[1]

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[1] Petitioner is incorrect in suggesting in the alternative (Br. 52-53) that, when a legislature provides an opportunity for opening prayers at its deliberative sessions, it creates a limited public forum. As discussed in the text, the historical purpose of providing such an opportunity is not to provide a forum for private prayer; it is to solemnize the body's proceedings and to seek divine guidance for the body's deliberations.

When considering the particular features of Nebraska's legislative prayer practice, moreover, the Court rejected the challenger's argument that the prayers violated the Establishment Clause because they were "in the Judeo-Christian tradition." *Marsh*, 463 U.S. at 793. The Court explained that "where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief," "[t]he content of the prayer is not of concern to judges." *Id.* at 794-795. In such circumstances, the Court held, "it is not for [judges] to embark on a sensitive evaluation or to parse the content of a particular prayer." *Id.* at 795.

2. The court of appeals correctly concluded that the decision in *Marsh* governs the constitutionality of legislative prayer practices and should govern the inquiry here. Pet. App. 10a-13a. The court of appeals erred, however, in its application of *Marsh* to petitioner's practice concerning the offering of prayers at the opening of Town Board sessions because it misconstrued this Court's later decision in *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989), as requiring that a court evaluating legislative prayer examine the sectarian nature of such prayers. Pet. App. 13a. In *County of Allegheny*, this Court held, *inter alia*, that a county's display of a crèche in the county courthouse violated the Establishment Clause because the display had the effect of communicating a government allegiance to a particular religious belief. 492 U.S. at 598-613. In responding to Justice Kennedy's dissenting opinion, the majority distinguished the legislative prayer practice upheld in *Marsh*. Acknowledging that "history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed"—a proposition that *Marsh* also

embraced, see 463 U.S. at 794-795—the Court stated that "[t]he legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.'" *County of Allegheny*, 492 U.S. at 603. The court of appeals here viewed that statement as requiring the court to graft a "reasonable observer" inquiry onto the *Marsh* analysis, including by examining the content of the prayers at issue. Pet. App. 13a. That was error.

The Court in *Marsh* did note that the chaplain employed by the Nebraska State Legislature described his prayers as "nonsectarian" and "Judeo Christian." 463 U.S. at 793 n.14. The Court also noted that, "[a]lthough some of [the chaplain's] earlier prayers were often explicitly Christian, [he] removed all references to Christ after a 1980 complaint from a Jewish legislator." *Ibid.* But the Court did not rely on those facts in rejecting the challenge before it; to the contrary, as noted above, the Court emphasized that it would not "parse the content" of the prayers absent any "indication that the prayer opportunity ha[d] been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-795.[5] The Court's characterization of *Marsh* in *County of Allegheny*—which did not concern legislative prayer—therefore did not alter the rule announced in *Marsh* itself.

In *Lee* v. *Weisman*, 505 U.S. 577 (1992), the Court—in the course of holding that the delivery of a prayer at a public high school graduation violated the Establishment Clause—explained that school officials could not play a role in dictating the content of prayer delivered at the ceremony even in a good-faith effort to ensure that

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[5] See *Van Orden*, 545 U.S. at 688 n.8 (Rehnquist, C.J., plurality opinion) ("In *Marsh*, the prayers were often explicitly Christian.").

the prayer was inclusive and nonsectarian and therefore less potentially divisive. *Id.* at 588-592. As the Court observed, "while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, the [Religion] Clauses exist to protect religion from government interference." *Id.* at 589. The circumstances of *Lee* differ from those in this case, for here the offering of a prayer serves to solemnize and "invoke Divine guidance" for the legislative body's own deliberations. *Marsh*, 463 U.S. at 792; see also *Lee*, 505 U.S. at 596-597) (noting that "[t]he atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential" of a public school event at which attendance is essentially mandatory for all graduating students). Still, the court of appeals' suggestion, see Pet. App. 22a, that petitioner should have been more involved in directing the content of the prayers delivered at Town Board meetings creates many of the concerns regarding involvement in the content of prayer this Court warned against in *Lee*.

B. The Court Of Appeals Erred In Declaring Petitioner's Prayer Practice To Be Unconstitutional Because Of The Prevalence Of Christian Sectarian References

1. The court of appeals erred in parsing the sectarian content of prayers offered at Town Board meetings

The court of appeals correctly noted that the prayers delivered by private individuals at petitioner's Town Board meetings "were not offensive in the way identified as problematic in *Marsh*" because "they did not preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like." Pet. App. 21a. The

court also correctly noted that "[t]he sectarian nature of the prayers * * * was not inherently a problem." *Ibid.* But the court nevertheless believed it was necessary to examine the prevalence of Christian references in the prayers that were delivered, explaining that its Establishment Clause analysis turned on "the extent to which the selection process" employed by petitioner "results in a perspective that is substantially neutral amongst creeds." *Id.* at 20a. In so doing, the court rejected petitioner's argument that, under *Marsh*, a court should "not consider the content of prayers absent an independent showing that the prayer opportunity has 'been exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" *Id.* at 20a-21a n.6 (quoting *Marsh*, 463 U.S. at 794-795). After examining the content of the prayers, see *id.* at 20a (noting that "most of the prayers at issue here contained uniquely Christian references"), the court of appeals concluded that a "reasonable observer" would feel, based on "the totality of the circumstances presented," that petitioner's "prayer practice identified [petitioner] with Christianity in violation of the Establishment Clause," *id.* at 21a-22a; see *id.* at 19a (concluding that petitioner's "prayer practice must be viewed as an endorsement of a particular religious viewpoint," based in part on "the content of the prayers"). That is not a proper application of *Marsh*.

The Court in *Marsh* established that a legislative prayer practice that has not been exploited to "proselytize or advance" any one faith or belief, or to disparage another, does not establish religion. 463 U.S. at 794. The limits concerning prayers that proselytize, advance one faith, or disparage another are consistent with the traditional purposes of legislative prayer to solemnize

the legislature's own proceedings and to invoke divine guidance for its deliberations. See *id.* at 792. Under that standard, petitioner's prayer practice is constitutional. It is not clear to what extent the Court intended the word "advance" to have a role beyond being an elaboration upon "proselytize," encompassing a broader range of conduct with the same general purpose. But to the extent it did, when read in context, the Court in *Marsh* presumably used "advance" to encompass as well a government affiliation with or a declaration of government allegiance to a particular faith or belief. The Court explained that legislative prayer does not offend the Establishment Clause because the Framers did not view it "as symbolically placing the government's official seal of approval on one religious view." *Ibid.* The Court in *County of Allegheny* similarly noted that a historical practice could not legitimate a modern-day practice "that demonstrates the government's allegiance to a particular sect or creed." 492 U.S. at 603. Thus, a legislative body may not adopt a practice concerning the offering of a prayer that has the effect of affiliating the government with a particular religion or otherwise declaring the government's allegiance to a particular religion—either through the government's own actions or through exploitation of the prayer opportunity by the prayer-givers themselves.[6] *Marsh* makes clear, howev-

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[6] Contrary to petitioner's suggestion (see, *e.g.*, Pet. Br. 21-22, 44), *Marsh*'s prohibition on the exploitation of an opportunity for prayer to proselytize or advance one faith, or to disparage another, applies both to the government entity providing the opportunity and to the prayer-givers accepting the opportunity, whether employed by the government or not. Under *Marsh*, a legislature could not, for example, invite private opening prayer-givers who proselytize or disparage another faith, even if the legislature itself did not have that purpose.

er, that a legislative prayer practice that results in the delivery of a substantial majority of prayers containing Christian references does not in itself have the effect of affiliating the government with Christianity or declaring the government's allegiance to Christianity.

2. The Nation's history of legislative bodies providing for a prayer at the opening of legislative sessions must inform the Court's analysis

a. The Court in *Marsh* relied heavily on the history of the offering of prayers in Congress. See 463 U.S. at 786-795. That history reveals that prayers offered in the House of Representatives and Senate have historically included (and to a lesser degree continue to include) frequent sectarian references. On its second day of business in 1774, the Continental Congress resolved that the Reverend Jacob Duché, an Episcopalian clergyman, should open the following day's meeting with prayer. See 1 J. of the Continental Cong. 26 (1774) (Journals). See also Martin J. Medhurst, *From Duché to Provoost: The Birth of Inaugural Prayer*, 24 J. Church & St. 573, 574 (1982) (Medhurst). On the following morning, September 7, 1774, Reverend Duché appeared before the Continental Congress "in his pontificals, and read several prayers in the established form, and then read the collect for the seventh day of September, which was the thirty-fifth psalm." *Id.* at 577. Following the reading of the prescribed Anglican prayers for that day, Reverend Duché then "struck out into an extemporary prayer," *ibid.*, that called upon the "Lord our Heavenly Father, King of Kings, and Lord of lords," and that concluded with the following words: "All this we ask in the name and through the merits of Jesus Christ thy son, our Savior, Amen," 25 *Letters of Delegates to Congress: 1774 to 1789* 551-552 (Paul Smith ed. 1998). In subse-

quent sessions of the Continental Congress, Reverend Duché continued the practice of opening legislative sessions with prayers that included similar sectarian references. See 2 Journals 12 (1775); 5 Journals 530 (1776). For example, the prayer Reverend Duché delivered in the Continental Congress after the Declaration of Independence was issued followed the same form as his prayer of September 7, 1774—*i.e.*, he addressed his prayer to "lord, our heavenly Father, high and mighty, King of kings and Lord of lords," and concluded by stating, "[a]ll this we ask in the name, and through the merits of Jesus Christ, thy Son and our Savior." 1 Lorenzo Sabine, *Biographical Sketches of Loyalists of the American Revolution* 389 (1979); see also Medhurst 580.

Since the adoption of the Constitution, prayers in Congress have similarly included sectarian Christian references. For example, Bishop William White, who was chosen as Senate Chaplain in 1790, regularly referred to Jesus in his official prayers. See Letter to the Reverend Henry D. Johns (Dec. 29, 1830), *reprinted in* Bird Wilson, *Memoir of the Life of the Right Reverend William White, D.D., Bishop of the Protestant Episcopal Church of the State of Pennsylvania* 322 (1939). The practice of delivering prayers with sectarian references has continued with every Congress. See Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2104 (1996) (noting that, "[f]rom America's earliest days to the present times," congressional legislative prayers "have been true sacral prayers, and many of them, true Christian prayers"); see also Pet. App. 127a (noting that "legislative prayer in Congress * * * is often overtly sectarian"). Although Congress today invites non-Christians to participate as guest chaplains, the great

majority of prayer-givers are still Christians and a substantial proportion of the prayers delivered at least in the House of Representatives may be viewed as containing identifiably sectarian references. Br. of Some Members of Cong. as Amici Curiae in Supp. of Pet. 10-20 (stating that a majority of the prayers delivered in the House of Representatives during the 112th Congress included Christian content); see, *e.g.*, 159 Cong. Rec. H2848 (daily ed. May 22, 2013); *id.* at H2664 (daily ed. May 16, 2013); *id.* at H2399 (Apr. 30, 2013); 158 Cong. Rec. H6471 (daily ed. Nov. 28, 2012); *id.* at H6305 (daily ed. Oct. 12, 2012); see also 159 Cong. Rec. S5625 (daily ed. July 11, 2013); 158 Cong. Rec. S5419 (daily ed. July 26, 2012); *id.* at S4379 (daily ed. June 21, 2012); *id.* at S2745 (daily ed. Apr. 26, 2012); *id.* at S1029 (daily ed. Feb. 27, 2012).[7]

Thus, the very historical practice on which this Court relied in *Marsh* to conclude that the offering of a prayer at the beginning of the session of a legislative body is permissible has included a great number of sectarian references, the overwhelming majority of which have been Christian. Such prayers are permissible notwithstanding their sectarian content because they "serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 36 (2004) (O'Connor, J., concurring in the judgment); see also *County of Allegheny*, 492 U.S. at 596 n.46. As the Court in *Marsh* explained, such a prayer invok[ing] Divine guidance" for the day's deliberations is a "tolerable acknowledgement of beliefs widely held

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[7] The text of the opening prayers offered in the House of Representatives for the 106th through 113th Congresses can be viewed at http://chaplain.house.gov/archive (last visited Aug. 1, 2013).

among the people of this country." 463 U.S. at 792. It does not have the effect of declaring the government's affiliation with or allegiance to a particular faith. See *id.* at 792, 794-795.

Where, as here, legislative prayers neither proselytize nor denigrate any faith, the inclusion of Christian references alone does not constitute an impermissible advancement or establishment of religion. The court of appeals therefore erred in declaring petitioner's practice unconstitutional based on an examination of the content of the prayers, contrary to this Court's admonition that courts have no place "embark[ing] on a sensitive evaluation" or "pars[ing] the content" of such prayers. *Marsh*, 463 U.S. at 794-795. When the Constitution permits prayer in a government setting (as the parties agree is the case with prayers offered at the beginning of a legislative body's day), the government must allow the prayer-giver to deliver the prayer in accordance with his own religious beliefs, including by praying to his own religious deity and in his own religious idiom—as long as the limits recognized in *Marsh* itself are respected by the government and prayer-giver. The principle that the government may not dictate the content of religious prayer is deeply embedded in the First Amendment. As this court explained in *Lee*: "It is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.'" 505 U.S. at 588 (quoting *Engel* v. *Vitale*, 370 U.S. 421, 425 (1962)).

Thus, as noted, when Christian prayer-givers have opened sessions of the House of Representatives, they

have frequently invoked the name of Jesus. Similarly, when non-Christian guests have delivered opening prayers in Congress, they have frequently invoked the names of deities and other figures in distinctly non-Christian terms. For example, a rabbi who recently served as a guest chaplain addressed his opening prayer in the Senate to "Adon Olam, Master of the Universe." 159 Cong. Rec. S3791 (daily ed. May 23, 2013). Similarly, a Muslim imam recently quoted Islamic scripture and called on the words of the Prophet Muhammed in his opening prayer before the House of Representatives. 158 Cong. Rec. H5633 (daily ed. Aug. 2, 2012).

b. As this Court has noted, the history of this country encompasses an unbroken tradition of formally "invok[ing] Divine guidance on [our] public bodies entrusted with making the laws," *Marsh*, 463 U.S. at 792, and "is replete with official references to the value and invocation of Divine guidance in deliberations," *Lynch* v. *Donnelly*, 465 U.S. 668, 675 (1984). It is that very history that insulates the practice of legislative prayer from challenge under the Establishment Clause so long as—consistent with the practice's purpose—the opportunity for prayer is not exploited in the ways identified in *Marsh*. The Court in *Marsh* thus concluded that "the Founding Fathers looked at invocations as 'conduct whose . . . effect . . . harmonize[d] with the tenets of some or all religions,'" *Marsh*, 463 U.S. at 792 (quoting *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961)) (alterations in original), rather than as "proselytizing activity" or conduct that "symbolically place[d] the government's official seal of approval on one religious view," *ibid.* (internal quotation marks omitted).

When a prayer is delivered in the proceedings of a governmental body that does not have the type of histor-

ical pedigree discussed in *Marsh*, it may be useful in mitigating Establishment Clause concerns for the body to take steps to clarify to a reasonable and informed observer that its practice is intended and designed to fall within that tradition. See *Simpson* v. *Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 284 (4th Cir. 2005) (upholding a county board of supervisors' prayer practice in part because the "invocations [were] directed only at the legislators themselves" rather than the public) (internal citation omitted). For example, a governmental body may choose to publish a statement expressing the purpose of the invocation or publicizing neutral and inclusive selection criteria. See *Rubin* v. *City of Lancaster*, 710 F.3d 1087, 1097-1099 (9th Cir. 2013) (upholding city council prayer practice where city opened participation to all and had publicized the nonsectarian purpose of its practice), petition for cert. pending, No. 13-89 (filed July 17, 2013); cf. *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 823, 841-842 (1995) (concluding that University's support of religious student group on same terms that it supported other student groups did not violate Establishment Clause in part because the "University ha[d] taken pains to disassociate itself from the private speech involved" by requiring public disclaimers).

A governmental body may also opt to structure its proceedings to reflect the role that the delivery of a prayer has historically played in legislative bodies such as the United States Congress. In some respects, for example, petitioner's Town Board differs from Congress because some members of the public attend Board meetings to conduct business directly with the Board rather than simply to observe the proceedings. See, *e.g.*, N.Y. Town Law § 274-b (West 2004) (authorizing towns to

issue special-use permits for various land-use purposes); http://greeceny.gov/files/clerk/townboard/TB%20SP%20instruct%20other%203~09.pdf (last visited Aug. 1, 2013) (instructions for obtaining special-use permits, including presenting request to the Board at a hearing convened by the Board). A practice of providing for the delivery of a prayer may more clearly fall within the type of historical tradition examined in *Marsh* if such a body structures its sessions to allow individuals who wish to conduct business before the Board but prefer not to be present for a prayer to "enter and leave with little comment and for any number of reasons." *Lee*, 505 U.S. at 596-597; cf. *Wynne* v. *Town of Great Falls*, 376 F.3d 292, 295 (4th Cir. 2004) (when plaintiff arrived late to town council meeting to avoid prayer, she was not permitted to participate in the meeting even though she had signed up and was listed on the agenda), cert. denied, 545 U.S. 1152 (2005).

3. Neither courts nor legislative bodies are well suited to police the sectarian content of prayers

The court of appeals acknowledged the admonitions concerning governmental scrutiny of the content of prayer in *Marsh* and disclaimed undertaking such an analysis. Pet. App. 20a. The court nevertheless suggested that it could easily discern which prayers contained sectarian references by counting such references as Jesus Christ and the Holy Trinity. *Id.* at 20a-21a; see *id.* at 7a. That approach cannot be reconciled with *Marsh*. Courts should not be in the business of parsing the theological content or meaning of particular prayers. It is true that references to Jesus Christ are generally Christian references. But courts have no business attempting to decide, for example, whether members of the group "Jews for Jesus" are Jewish, Christian, both,

or something else entirely. See, *e.g.*, *Rubin*, 710 F.3d at 1100-1101 (noting that "the very act of deciding—as a matter of constitutional law, no less—who counts as a 'religious figure' or what amounts to a 'sectarian reference' not only embroils judges in precisely those intrareligious controversies that the Constitution requires us to avoid, but also imposes on us a task that we are incompetent to perform"); *Pelphrey* v. *Cobb Cnty.*, 547 F.3d 1263, 1272 (11th Cir. 2008) (same).

Similarly, because a court could not enjoin or place limits on the prevalence of only sectarian Christian prayers, the court of appeals' approach would inevitably require courts to decide questions such as whether references to the "Holy Spirit" are uniquely Christian, whether prayers addressed to "Allah" are uniquely Muslim, and whether references in particular prayers to "King of Kings" are Jewish, Christian, or Muslim. Courts should play no role in rendering a verdict on such theological questions. See, *e.g.*, *Hernandez* v. *CIR*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith."); *Lee*, 505 U.S. at 616-617 (Souter, J., concurring) ("I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible," than drawing "distinction[s] between 'sectarian' religious practices and those that would be, by some measure, ecumenical enough to pass Establishment Clause muster."). It is not the place of the federal Judiciary, a Town Board, or Members of Congress to compile a list of religious words that may be used in legislative prayers and a list of religious words that may not, so long as the prayer opportunity is not exploited to proselytize or

ally the government with a particular faith or disparage another.

Nor is it an answer to suggest that nonsectarian "Judeo-Christian" prayers are permissible while other types of prayers are not. Judeo-Christian prayers "exclude those who do not believe in monotheism (for example, those who practice the Hindu faith)," *Newdow* v. *Bush*, 355 F. Supp. 2d 265, 289 n.29 (D.D.C. 2005) (citation omitted), and "presuppose[] one God who is generally thought to be omniscient, omnipotent, benevolent, and responsive to prayer," *Hinrichs* v. *Bosma*, 400 F. Supp. 2d 1103, 1123 (S.D. Ind. 2005). See also *Lee*, 505 U.S. at 617 (Souter, J., concurring) (noting that "[m]any Americans who consider themselves religious are not theistic," and that "some, like several of the Framers, are deists who would question * * * a plea for divine advancement of the country's political and moral good"). The court of appeals thus observed that "it is not even clear that the removal of references to Christ" by the chaplain at issue in *Marsh* "rendered all post-1980 prayers [in the Nebraska State Legislature] nondenominational." Pet. App. 17a. The Establishment Clause frowns on the government's endorsement of a "civic religion" that includes "nonsectarian prayer * * * within the embrace of what is known as the Judeo-Christian tradition" and makes no "explicit references to the God of Israel, or to Jesus Christ, or to a patron saint," just as much as it frowns on the government's allegiance to a particular religious sect. *Lee*, 505 U.S. at 589.

C. The Court Of Appeals Further Erred By Assessing The Constitutionality Of Petitioner's Practice Concerning The Delivery Of A Prayer According To The Prevalence Of Christians Among The Prayer-Givers

The court of appeals also erred in determining that petitioner's practice violates the Establishment Clause because petitioner's process of selecting prayer-givers has nearly always resulted in the selection of a Christian prayer-giver. Pet. App. 19a-20a. The court of appeals accepted the district court's conclusion that petitioner's selection process was free of religious animus. *Id.* at 10a, 22a. The court also acknowledged that nearly every religious institution within petitioner's borders is a Christian denomination. *Id.* at 5a-6a, 19a. And the court accepted petitioner's contention that "it would have accepted any and all volunteers who asked to give the prayer," regardless of their religious affiliation (if any). *Id.* at 20a. The court of appeals nevertheless viewed petitioner's practice as unconstitutional because its religiously neutral selection criteria resulted in the delivery of predominantly Christian prayers rather than "a perspective that is substantially neutral amongst creeds." *Ibid.*

The history of prayers offered in connection with legislative deliberation in this country makes clear that a legislative body need not affirmatively solicit a court-mandated variety of different religious faiths—from inside and outside of the borders governed by the legislative body—in order to avoid running afoul of the Establishment Clause. As noted, the United States House of Representatives and Senate have a long and virtually unbroken tradition of employing official chaplains. Every House and Senate Chaplain has belonged to a Christian sect, a fact of which this Court was well aware

when it decided *Marsh*. See Gov't Amicus Br. at 11-12, 16-17, *Marsh*, No. 82-23.[8] The Court explained that the long-term appointment of a chaplain of one denomination does not "advance[] the beliefs of a particular church" absent proof that such appointment "stemmed from an impermissible motive." *Marsh*, 463 U.S. at 793. Even in *Marsh*, where the challenged practice involved the long-term employment of a chaplain of one faith, this Court explained that "legislative prayer presents no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations." *Id.* at 791 (internal citations omitted). It is difficult to understand how petitioner's practice, which affords an opportunity to all who volunteer, regardless of their faith, could present more "potential for establishment"

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[8] The Chaplains who delivered opening prayers in the Continental Congress and the First and Second Congresses were each from Christian denominations. The Continental Congress selected and paid Episcopal clergyman Reverend Jacob Duché. See 1 Journals 26 (1774); 2 Journals 12 (1775); 5 Journals 530 (1776). In the First Congress, the Senate elected as its Chaplain Episcopal bishop Reverend Samuel Provoost, see 1 J. of Senate 10, 16 (1789), while the House elected as its Chaplain Presbyterian minister Reverend William Linn, see 1 J. of H.R. 11-12, 26 (1789). Since that time, it appears that all the Chaplains in the United States Senate and House of Representatives, who deliver most of the opening prayers in those bodies, also have been from Christian denominations. See http://www.senate.gov/artandhistory/history/common/briefing/Senate_Chaplain.htm#2e; (listing all Senate Chaplains) (last visited Aug. 1, 2013); http://chaplain.house.gov/chaplaincy/history.html (listing all House Chaplains) (last visited Aug. 1, 2013). The same is true of most of the private clergy who have delivered opening prayers in the Senate and House of Representatives in recent years. See Br. of Some Members of Cong. as Amicus in Supp. of Pet. 9.

than the practices of the Nebraska State Legislature or the United States Congress. *Ibid.*

Indeed, the court of appeals' view that petitioner should have implemented what amounts to a sectarian-quota system raises more First Amendment problems than it might solve. First, it would require petitioner to closely police the content of prayers delivered by private individuals. As discussed at pp. 15-27, *supra*, that alone would offend the Establishment Clause. Second, it would require petitioner affirmatively to solicit participation by particular non-Christian sects outside petitioner's borders until the diversity of religious viewpoints presented at Board meetings reached the point of satisfying the court of appeals' undefined "substantially neutral amongst creeds" standard. See Pet. App. 20a.

That type of selective invitation and viewpoint-balancing would require the government to engage in behavior that is not neutral as to all religions. As Justice Souter explained in his concurring opinion in *Lee*: "Nor does it solve the problem to say that the State should promote a 'diversity' of religious views; that position would necessarily compel the government and, inevitably, the courts to make wholly inappropriate judgments about the number of religions the State should sponsor and the relative frequency with which it should sponsor each." 505 U.S. at 617. Such a system is certainly not required by *Marsh*, which held that a legislature's selection of persons to deliver a prayer at the beginning of its session need only be free of any intent to advance a particular religion. See 463 U.S. at 793.

Nor is such an approach consistent with Establishment Clause principles in other contexts. In *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 643-662 (2002), for example, the Court held that the government may offer

school vouchers for use at any private school, including a religious school, as long as the government uses neutral eligibility rules and the choice of school is left to private citizens. That was so even though up to 96% of voucher recipients chose to enroll in religious schools. See *id.* at 658-659; see also *Rosenberger*, 515 U.S. at 837-846 (holding that a public university's provision of financial assistance to a student religious group did not violate the Establishment Clause where such aid was provided to student groups generally without regard to whether they had a religious affiliation); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8-14 (1993) (holding that a deaf student enrolled in a religious school was entitled to the services of a publicly employed sign-language interpreter where the interpreter's services were generally available to children with hearing impairments).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2013

AMICUS CURIAE BRIEF

No. 12-696

In the Supreme Court of the United States

TOWN OF GREECE, NEW YORK,
Petitioner,

v.

SUSAN GALLOWAY, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE DR. DANIEL L. AKIN; DR. DARRELL L. BOCK; DR. D.A. CARSON; DR. C. STEPHEN EVANS; DR. WAYNE GRUDEM; DR. JAMES M. HAMILTON; DR. H. WAYNE HOUSE; DR. PETER A. LILLBACK; DR. R. ALBERT MOHLER, JR.; AND J. MICHAEL THIGPEN IN SUPPORT OF PETITIONER AND REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are theologians and scholars, who are concerned about the argument made by Respondents (Plaintiffs below) before the district court and the Second Circuit and accepted by the Fourth Circuit in *Joyner v. Forsyth County, NC*, 653 F.3d 341 (4th Cir. 2011); the Seventh Circuit in *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006); and the Tenth Circuit in *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998), that only religiously "neutral" prayers should be permitted as a legislative invocation. *Amici Curiae* assert that there can be no such thing as a religiously "neutral" prayer and that attempts to establish a standard for a religiously "neutral" prayer are contrary to the very concept of prayer and require that the judiciary become arbiters of a state orthodoxy—a task for which any governmental entity is ill suited. *Amici Curiae* believe that the Court should reverse the Second Circuit's decision below and make clear that the Religion Clauses of the First Amendment do not require legislative invocations to be religiously "neutral" prayers.

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[1] All parties of record consented to the filing of *amicus* briefs in support of either or neither party and such consents are on file with the Court. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

from Southwestern Baptist Theological Seminary, and a Doctorate of Philosophy from the University of Texas at Arlington. Dr. Akin also served as Executive Editor of *The Southern Baptist Journal of Theology*.

Dr. Darrell L. Bock is Executive Director of Cultural Engagement and Senior Research Professor of New Testament Studies at Dallas Theological Seminary. Dr. Bock received his Bachelor of Arts from the University of Texas, a Masters of Theology from Dallas Theological Seminary, and a Doctorate of Philosophy from the University of Aberdeen. Dr. Bock earned international recognition as a Humboldt Scholar at Tübingen University in Germany. Dr. Bock was president of the Evangelical Theological Society and is editor-at-large for *Christianity Today*. Dr. Bock is also a *New York Times* best-selling author in nonfiction, and his articles have appeared in leading journals and periodicals, including the *Los Angeles Times* and the *Dallas Morning News*.

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SUMMARY OF THE ARGUMENT

In *Marsh v. Chambers*, this Court affirmed the constitutionality of legislative invocations and held that courts shall not parse the content of an invocation unless the invocation opportunity has been exploited to proselytize or disparage. Moreover, this Court, in *Lee v. Weisman*, noted that regulating a prayer's content violates the Establishment Clause by imposing a "civic" orthodoxy of neutrality in which judges would determine the terms and phrases that may or may not be used to refer to deities and even which deities may be addressed. This judicially-arbitrated civic orthodoxy would require that the civil courts decide theological matters, adopt standards of which religious beliefs are "neutral," and establish some terms or deities as prohibited and others as favored—a task that courts have found impossible in practice to perform. Furthermore, courts that impose religious "neutrality" categorically exclude certain religions that require the use of those prohibited terms and violate the mandate of the Establishment Clause that all persons be treated equally by the government, regardless of religious creed. While recognizing these problems with the imposition of religious "neutrality," the Second Circuit nevertheless proceeded to parse the content of the Town of Greece's prayers and to demand that the Town of Greece either impose such a state orthodoxy of "neutrality" or manufacture the perception of diversity. The only way to prevent the establishment of a civic orthodoxy—and a gross violation of the Establishment Clause—is to avoid judicial evaluation of the content of

any invocation, allowing each person to offer an invocation according to the dictates of conscience. To avoid this violation of the Establishment Clause, the Court should reverse the decision below and reinforce the freedom to pray according to the dictates of conscience that is inherent in this Court's opinion in *Marsh v. Chambers*.

ARGUMENT

I. For a court to determine that a prayer is religiously "neutral,"[2] it must impermissibly consider the content of the prayer and compare it with a state-established orthodoxy of neutrality.

This Court has long held that the judiciary is not competent to decide theological matters. *See, e.g., Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 445–46 (1969) ("[I]t [is] wholly

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[2] To avoid confusion regarding whether the terms "sectarian" and "nonsectarian" refer to prayers that are or are not religiously "neutral" or, instead, to one sect or denomination of a religion and because the term "sectarian" has a negative connotation, this Brief avoids these terms to characterize religious content. *See, e.g., Marsh v. Chambers,* 463 U.S. 783, 793 n.14 (1983) (noting that Rev. Palmer characterized his prayers as "nonsectarian" and "Judeo Christian" and describing some of Rev. Palmer's prayers as "explicitly Christian"); *Colorado Christian University v. Weaver,* 534 F.3d 1245, 1258 n.5 (10th Cir. 2008) ("We recognize that the term 'sectarian' imparts a negative connotation. *See Funk & Wagnalls New International Dictionary of the English Language* 1137 (comp. ed. 1987) (defining 'sectarian' as meaning '[p]ertaining to a sect; bigoted.').").

inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions."). In *Marsh v. Chambers,* this Court recognized the danger of judicial intrusion into prayer and declared, "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." *Marsh,* 463 U.S. at 794–95. Therefore, while courts may consider whether an opportunity for legislative prayer is disparaging or proselytizing, they are prohibited from considering the theological nature of the prayer. Furthermore, this Court in *Lee v. Weisman* noted that the government's requiring religiously "neutral" prayers would be tantamount to "compos[ing] official prayers." *Lee v. Weisman,* 505 U.S. 577, 588 (1992) (quoting *Engel v. Vitale,* 370 U.S. 421, 425 (1962)).

The judiciary is not qualified to decide theological questions. An understanding of American legal theory does not qualify a judge to render opinions on the theology and beliefs of adherents to hundreds of different faiths and sects. "[T]he skills required to address such questions ... require some expertise in specialized disciplines such as theology, Biblical studies, comparative religion, or the history or philosophy of religion, rather than in constitutional law." Robert J. Delahunty, *"Varied Carols": Legislative Prayer in a Pluralistic Society*, 40 Creighton L. Rev. 517, 550 (2007). As Justice Souter wrote, "I can hardly imagine a subject less amenable to the competence of

the federal judiciary, or more deliberately to be avoided where possible" than "comparative theology." *Lee,* 505 U.S. at 616–17 (Souter, J., concurring).

Furthermore, requiring that prayers be religiously "neutral" logically necessitates that a judicially-sanctioned "civic" religion be established. Such an approach would require judges to determine what terms and phrases may or may not be used to refer to God. Judges would become the arbiters of a new orthodoxy of "neutrality," setting standards by which deities may be addressed in public prayers. As Justice Kennedy observed in *Lee v. Weisman,* "[Our] precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted." *Lee,* 505 U.S., at 590.

The establishment of a "neutral" orthodoxy, administered by the judiciary, would be a violation of the Establishment Clause far more egregious than the perceived harm sought to be attenuated. "A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Id.* at 592.

The establishment of a "neutral" orthodoxy would also necessitate that the courts establish some religions or some religious terms as more favored than others. For example, in *Hinrichs v. Bosma,* a district court in

the Seventh Circuit found that "[p]rayers are sectarian ... when they proclaim or otherwise communicate the beliefs that Jesus of Nazareth was the Christ, the Messiah, the Son of God, or the Savior, or that he was resurrected, or that he will return on Judgment Day or is otherwise divine," but prayers are not sectarian if "a Muslim imam [offered] a prayer addressed to 'Allah.'" *Hinrichs v. Bosma,* No. 1:05-cv-0813-DFH-TAB, 2005 U.S. Dist. LEXIS 38330 (S.D. Ind. Dec. 28, 2005) (order denying a motion to stay).

Likewise, in *Pelphrey v. Cobb County,* the Eleventh Circuit noted that even in that one case, the handful of plaintiffs and their counsel could not agree upon which religious terms are neutral and which are not. That court observed:

> We would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions, and the [plaintiffs] have been opaque in explaining that standard. Even the individual [plaintiffs] cannot agree on which expressions are "sectarian." Bats, one of the [plaintiffs], testified that a prohibition of "sectarian" references would preclude the use of "father," "Allah," and "Zoraster" but would allow "God" and "Jehovah." Selman, another [plaintiff], testified, "[Y]ou can't say Jesus, ... Jehovah, ... [or] Wicca. ..." Selman also deemed "lord or father" impermissible.
>
> The [plaintiffs'] counsel fared no better than his clients in providing a consistent and workable definition of sectarian expressions. In the district court, counsel for the [plaintiffs]

> deemed "Heavenly Father" and "Lord" nonsectarian, even though his clients testified to the contrary. At the hearing for oral arguments before this Court, the [plaintiffs'] counsel asserted two standards to determine when references are impermissibly "sectarian." ... Counsel had difficulty applying either standard to various religious expressions. When asked, for example, whether "King of kings" was sectarian, he replied, "King of kings may be a tough one. ... It is arguably a reference to one God. ... I think it is safe to conclude that it might not be sectarian."

Pelphrey v. Cobb County, 547 F.3d 1263, 1272 (11th Cir. 2008). The Eleventh Circuit went on to explain that parsing the terms used in every prayer at legislative assemblies of every level would lead to judicial chaos. *Id.* As that court wryly noted, "Whe her invocations of 'Lord of lords' or 'the God of Abraham, Isaac, and Mohammed' are 'sectarian' is best left to theologians, not courts of law." *Id.* at 1267.

Just this year, the Ninth Circuit recognized these problems in its decision in *Rubin v. City of Lancaster:*

> Second, the very act of deciding—as a matter of constitutional law, no less—who counts as a "religious figure" or what amounts to a "sectarian reference" not only embroils judges in precisely those intrareligious controversies that the Constitution requires us to avoid, but also imposes on us a task that we are incompetent to perform. *See Lee*, 505 U.S. at 616–17 (Souter, J., concurring). Rubin and Feller ask us to forbid

mention of Jesus, since he is clearly a religious figure. Ostensibly, the same is true of "Allah," "Muhammad," or "Buddha." But do more generic religious appellations also cross the line? "Heavenly Father" strikes some as comfortably ecumenical, *see, e.g.*, *Simpson*, 404 F.3d at 284, yet several sects reject the "fatherhood of God," *see generally, e.g.*, Elizabeth A. Johnson, *She Who Is: The Mystery of God in Feminist Theological Discourse* (2002), and some reject even the idea of a heavenly deity, *see generally, e.g.*, Paul Harrison, *Elements of Pantheism: Religious Reverence of Nature and the Universe* (2004). Other seemingly "safe" Judeo-Christian monikers, such as "Lord," "Jehovah," "Abraham," and "Moses," are no less problematic. *See Joyner*, 653 F.3d at 364 (Niemeyer, J., dissenting) ("[A]dherents to the Hindu or Muslim religions could assert that they are offended by prayers in the Judeo-Christian tradition, which the majority has deemed to be nonsectarian and nonoffensive."). Even within the Judeo-Christian tradition, some deific titles that seem ecumenical turn out not to be. *See id.* ("[I]n *Simpson*, we labeled as nonsectarian references to 'Lord of [l]ords,' and "King of [k]ings.' ... Yet, those phrases refer to Jesus in the New Testament. *See* Revelations, 19:15."). As these few examples show, "[s]imply by requiring the enquiry, nonpreferentialists invite the courts to engage in comparative theology." *Lee*, 505 U.S. at 616–17 (Souter, J., concurring). We "can hardly imagine a subject less amenable to the competence of the federal judiciary, or

more deliberately to be avoided where possible." *Id*. Thus, we avoid it here.

Rubin v. City of Lancaster, 710 F.3d 1087, 1100–01 (9th Cir. 2013) (brackets and ellipses in the original).

II. Every prayer adopts particular religious beliefs and is therefore not religiously "neutral."

Not only would parsing the content of legislative prayers lead to the establishment of a state orthodoxy, because every prayer adopts or presupposes particular religious beliefs that are not universally accepted,[3] this orthodoxy would necessarily favor some religions and offend others. As one law review article observes:

> Not all religions are monotheistic. For religions involving multiple gods and/or goddesses, a rule requiring that the prayer giver refrain from naming a deity precludes the offering of a prayer in their normal faith tradition. Second, there are Christian denominations whose doctrinal statements require that prayers invoke the name of Jesus Christ. ...
>
> A rule prohibiting the naming of a particular deity, then, categorically excludes certain

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[3] "All prayer involves an element of worship, for it always entails the lower addressing the higher, and this higher assumes, in the mind of the believer a particular form conforming to a particular faith." Phillip Zaleski & Carol Zaleski, *Prayer: A History* 305 (2005).

> religions, and in so doing violates the Establishment Clause. If the Establishment Clause prohibits the government from doing anything, it prohibits categorically barring the adherents of certain faiths from participating in public events on equal terms with followers of other religions. The government cannot make violating any citizen's religious faith a condition precedent to equal treatment.

Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 Georgetown J.L. & Pub. Pol'y 219, 254–55 (2008).

Even a prayer as simple as "God save this honorable court" makes specific religious statements that are in accord with some religious beliefs and in discord with others. This brief prayer, far from being religiously "neutral," presupposes one, personal deity who hears and responds to prayer, who intervenes in history, and who has the power to "save this honorable court."[4] These presuppositions are rejected by polytheistic beliefs, which believe in gods instead of God; by deistic beliefs, which reject the idea that God intervenes in

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[4] "When we pray to God there are things, each of huge importance, implicit in our action. First there is the acknowledgement that God, albeit all powerful and the creator of the universe, is not an impersonal force or source of energy or colossal agent of nature, but is an actual being, who can be addressed in a meaningful way. Prayer is directed to a personal God, who receives it and listens to it—and who may answer it." Paul Johnson, *The Quest for God: A Personal Pilgrimage* 184 (1996).

history or responds to prayer; and by atheistic beliefs, which reject the existence of a god or gods altogether.

The Seventh Circuit reached the issues inherent in attempting to understand any prayer as "neutral" in *Kerr v. Farrey:*

> The district court thought that the [Narcotics Anonymous] program escaped the "religious" label be[illegible]ise the twelve steps used phrases like "God, as we understood Him," and because the warden indicated that the concept of God could include the non-religious idea of willpower within the individual. We are unable to agree with this interpretation. A straightforward reading of the twelve steps shows clearly that the steps are based on the monotheistic idea of a single God or Supreme Being. True, that God might be known as Allah to some, or YHWH to others, of the Holy Trinity to still others, but the twelve steps consistently refer to "God, as we understood Him." Even if we expanded the steps to include polytheistic ideals, or animalistic philosophies, they are still fundamentally based on a religious concept of a Higher Power.

Kerr v. Farrey, 95 F.3d 472, 479–80 (7th Cir. 1996).

Theistic presuppositions also conflict with certain forms of Buddhism. As one religious scholar noted,

> [T]wo varieties at least of Buddhism are very different from theism: the Theravada and Madhyamika, one of the mainstream forms of Mahayana Buddhism. It was not for nothing

> that the Dalai Lama declared ... "We Buddhists are atheists."
>
> ... [Buddhism] has deep spiritual books and philosophies. But it is still atheist: it rejects the notion of a creator God who will help out with our troubles.

Ninian Smart, *Dimensions of the Sacred: An Anatomy of the World's Beliefs* 27 (1996).

The distinction between monotheistic religious beliefs and other religious beliefs undermines the idea that references to "God" in the generic do not "advance" one form of religious belief or "disparage" another. Indeed, with the multitude of religious beliefs in the United States, it is impossible to craft any prayer that comports with the fundamental beliefs of them all. Demanding that legislative invocations be of this fictional "neutral" form is to ban them altogether or to adopt a state orthodoxy of "neutrality."

Finally, forcing prayer, rich with theological meaning as each prayer is, to comport with a state orthodoxy of "neutrality" discriminates against those whose religious beliefs require them to pray in a manner inconsistent with that "neutrality." If praying "in Jesus' name" is prohibited, then those who believe they must pray "in Jesus' name" are effectively prohibited from being able to participate in a legislative prayer because their religious views conflict with those of the state. Likewise, a person who believes that all prayers must include the name "Allah" would be

prohibited from praying under this forced "neutrality."[5] As this Court said in *Lee v. Weisman,* "It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights or benefits as the price of resisting conformance to state-sponsored religious practice." *Lee,* 505 U.S. at 596.

CONCLUSION

Ultimately, attempts to promote "civic religion" or "religious neutrality" impermissibly establish the judiciary as the arbiters of the "neutral" orthodoxy. This orthodoxy would necessarily favor some religions over others. The only way to avoid this establishment of religion and to remain truly neutral is to follow the guidance of *Marsh*: refusing to consider the content of any prayer and permitting each person to pray according to the dictates of conscience. Unfortunately, the Fourth Circuit Court of Appeals in *Joyner v. Forsyth County, NC*, the Seventh Circuit Court of Appeals in *Hinrichs v. Bosma,* and the Tenth Circuit Court of Appeals in *Snyder v. Murray City Corp.* rejected this principle and instead established a civic orthodoxy. The Eleventh Circuit Court of Appeals in *Pelphrey v. Cobb County* and the Ninth Circuit Court of Appeals in *Rubin v. City of Lancaster*, however, recognizing the threat to religious liberty described herein, adopted this principle of freedom of conscience.

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[5] *See, e.g.,* Shaikh Abdullah ibn Abi Zayd al-Qayrawani, *The Risala: A Treatise on Maliki Fiqh* 1.1a ("The belief that Allah is One is the fundamental basis of Islam, and when Divine Unity is expressed, the name "Allah" must be used. It is not permissible to say, "There is no god but the Almighty" or use any other names except Allah.").

In its decision below, the Second Circuit Court of Appeals, while recognizing this the threat to religious liberty posed by judging the content of prayers, nevertheless proceeded to mandate that the Town of Greece either impose a state orthodoxy of "neutrality" or manufacture the perception of diversity contrary to *Marsh* and *Lee*. The Second Circuit's decision fails to allow private speakers, including theologians and scholars such as *Amici,* who desire to pray to do so according to the dictates of their own consciences without regard to the content of their prayers. To protect religious liberty and freedom of conscience, the Court should reverse the decision below and reinforce the freedom to pray according to the dictates of conscience that is inherent in this Court's opinions in *Marsh v. Chambers* and *Lee v. Weisman.*

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AMICUS CURIAE BRIEF

No. 12-696

In The Supreme Court of the United States

TOWN OF GREECE, NEW YORK,

Petitioner,

v.

SUSAN GALLOWAY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law.

ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or for amici, *e.g.*, *FCC v. Fox TV*, 132 S. Ct. 2307 (2012); *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007). The ACLJ regularly litigates in the area of free speech (including the scope of government speech, *e.g.*, *Pleasant Grove*) and religious liberty (including the Establishment Clause and standing to sue thereunder, *e.g.*, *Lamb's Chapel*; *Hein*).

SUMMARY OF ARGUMENT

This amicus brief makes two points: (1) proper application of the government vs. private speech doctrine shows that the challenged prayers are private speech, and (2) the assertion of offended observer standing on which this lawsuit rests is inconsistent with Article III's limits on federal subject matter jurisdiction.

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[1]The parties in this case have consented to the filing of this amicus brief. Blanket letters of consent are on file with the Court. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

1. This Court has emphasized the "crucial difference between government speech . . . and private speech" for purposes of Establishment Clause analysis. *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 302 (2000). Identifying speech as governmental or private can be obvious, but in some cases drawing the distinction can seem daunting. When a particular instance of expression emerges from a mix of both government and private input – e.g., vanity license plates, or student performances at a public school event – proper analysis requires the Court *to analyze separately the component parts* of the activity in question, rather than attempt to attach a blanket label to the entire activity. Such an analysis, applied to this case, shows that the religious content to which the respondents object is the constitutionally protected *private* speech of the guest speakers, not the speech of the town.

2. Offended observer standing – the sole basis for federal court jurisdiction in the present lawsuit – cannot be reconciled with Article III. To be sure, there are situations where exposure to objectionable content can be genuinely coercive – e.g., in compulsory education or in prisons. Absent such coercion, however, merely taking offense at what one hears or sees is insufficient to trigger a constitutional injury that could give rise to standing. Hence, the present suit fails for want of subject matter jurisdiction.

ARGUMENT

The speech to which respondents object is the private, constitutionally protected speech of invited individuals, not the government speech of the petitioner town. Moreover, respondents lacked

standing even to bring this challenge, as they assert no more than "offended observer" standing.

I. THE SPEECH TO WHICH RESPONDENTS OBJECT IS PRIVATE SPEECH, NOT GOVERNMENT SPEECH.

A. The Distinction Between Government Speech and Private Speech is Crucial.

This Court has held that the Establishment Clause applies to the states by virtue of the Fourteenth Amendment. *Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947). But the Fourteenth Amendment only restricts *state action*. *See* U.S. Const. amend. XIV ("No State shall . . ."). Thus, while "government speech must comport with the Establishment Clause," *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009), the religious speech of *private parties*, by contrast, is constitutionally protected, *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981). "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (and cases cited).

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Id. (citations omitted; emphasis in original).

A key question in any litigation over religious speech, therefore, is whether the challenged speech is that of the government or of private parties. "[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality).[2] Moreover, merely *allowing* private speech does not convert it into government speech: "The proposition that [government bodies] do not endorse everything they fail to censor is not complicated." *Id.*

To be sure, even undisputed *government* action that entails expression with religious content does not necessarily run afoul of the Establishment Clause. Examples include this Court's declaration that "We are a religious people whose institutions presuppose a Supreme Being," *Zorach v. Clauson*, 343 U.S. 306, 313 (1952); a municipal display of a Nativity scene, *Lynch v. Donnelly*, 465 U.S. 668 (1984); and a state display of the Ten Commandments, *Van Orden v. Perry*, 545 U.S. 677 (2005). *A fortiori*, where the speech is private, not governmental, an Establishment Clause challenge is that much more likely to fail. *Capitol Square*; *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).

---

[2]Amicus agrees with petitioners that the "endorsement test" represents a failed jurisprudential experiment under the Establishment Clause. That the language quoted from *Mergens* employs vocabulary associated with this failed endorsement approach does not detract from the larger principle, however, that the distinction between governmental and private action is vital to the preservation of liberty and constitutional rights. *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988).

B. To Draw the Line between Government Speech and Private Speech, the Component Parts Must Be Analyzed Separately.

In their brief in opposition to certiorari, respondents relied upon lower court cases holding that invocations at government meetings are "government speech," Opp. at 30. Application of the government speech doctrine here, however, leads to the conclusion that the challenged prayers are private speech. Thus, wholly apart from the question whether the *public forum doctrine* affirmatively would require equal access to private persons to offer invocations, the *Establishment Clause* analysis must take into account the fact that the challenged prayers are the speech of private parties, not the town.

"There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech," *Pleasant Grove*, 555 U.S. at 470, but, as in *Pleasant Grove*, "this case does not present such a situation," *id.* The prayers or invocations (there was no requirement that the speech be a prayer) were given by private parties. The town did not control, suggest, review, or edit the prayers or invocations in any way. Moreover, anyone may offer the invocation or prayer. All of this is undisputed. Pet. App. 3a-4a.

Even if this case were regarded as involving "mixed speech" of government and private parties, *e.g.*, *West Va. Ass'n of Club Owners v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (where private parties and the government both play roles in an event or activity, the situation entails "mixed" or "hybrid speech"),

respondents' challenge here is to the *privately chosen content*. While some lower courts have described complicated tests for identifying private versus governmental speech, *e.g.*, *Sons of Confederate Veterans v. Commissioner of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618-19 (4th Cir. 2002) (referring to four-factor test used in other circuits, but describing those factors as not necessarily "an exhaustive or always-applicable list"), this Court has never embraced that model. Moreover, such "four-factor tests" needlessly complicate matters. There is no necessity to apply a blanket "government" or "private" label to the entirety of the interplay between governmental and private actors. A famous artist's speech does not become government speech just because the artist delivers that address at the commencement exercises of a state school. The remarks of a business owner or environmental activist do not count as government speech just because they are invited participants in a government-sponsored panel discussion. In all such cases, a court should *examine the component parts* separately to determine whether the particular content in question is government speech.

To illustrate this approach, consider a public school talent show. Is a student performer's rendition of the song, "Amazing Grace," private speech or government speech (the latter raising Establishment Clause questions)? Rather than collapsing together the school's involvement and the student's role, a court should examine the components. Thus, the school is the one that chooses to have a talent show; that determines which students are eligible; that sets the date, time, and length of the program; that sets the

parameters for performance genres (songs? skits? dance?). Each of these decisions is state action – and, if communicative, government speech – subject to whatever constitutional limits might apply. But what about the song itself? If the school picks the song, then yes, that content is government speech. If the school provides a limited menu of song options (or identifies a theme), then the delineation of that list (or theme) is state action, but the student's voluntary selection within those parameters is a private choice (as with the vehicle owner who chooses from a state-provided list of commemorative license plate options). If the school leaves the choice entirely to the student (albeit subject to limitations on length, decency, defamatory content, and so forth), then the song selected is the student's speech. In this way, the analysis trains in upon the identity of the actor making the relevant content choice, rather than attempting to make a global judgment about the entire production.

C. Respondents Object to Private Speech.

In the present case, such component-based analysis confirms that the challenged speech is private, not government, speech.

The town is the entity that decided to have invocations, to allow guest speakers to offer those invocations, and to open the process to anyone interested, while inviting all area clergy to fill the remaining slots. Neither the respondents nor the Second Circuit apparently find fault thus far. Indeed, they must concede that under *Marsh v. Chambers*, 463 U.S. 783 (1983), the town could have *hired* a *single* clergyman to handle *all* the invocations. Having rotating, unpaid, private guest "invokers" is plainly

less problematic under the Establishment Clause.

What the Second Circuit disapproved, rather, was the *content* of the prayers, and in particular the frequency of Christian references. This, however, was entirely the doing of the guest prayer-givers, with no input from the town. That the local demographics frequently yield guest speakers who are Christian is no more unconstitutional than that the same demographics frequently yield elected officials and municipal staff who are Christian. The decisive, undisputed point is that the composition of the particular invocations was completely the work of the private speakers. *Compare Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005) (finding government speech where the "message . . . is from beginning to end the message established by the . . . Government"). The content of the invocations was private speech, not government speech, and the Establishment Clause analysis must proceed on that basis.

II. RESPONDENTS' ASSERTION OF "OFFENDED OBSERVER" STANDING DOES NOT SUFFICE TO SATISFY ARTICLE III.

Respondents' standing in this case rests upon personal objection and hurt feelings. In other words, this is a case of "offended observer" standing. Never has this Court approved anything like such a wide-open concept of access to federal adjudication. Indeed, to the extent this Court has addressed the issue at all, it has firmly repudiated such limitless theories of Article III standing. Therefore, since "the record discloses that the lower court was without jurisdiction this court will notice the defect, although

the parties make no contention concerning it." *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (internal quotation marks and citation omitted). Indeed, this "obligation to notice defects in . . . subject matter jurisdiction assumes a special importance when a constitutional question is presented," *id.* at 541-42, as in this case. This Court should therefore reverse the decision of the Second Circuit and remand for dismissal of this lawsuit for lack of standing.

A. Article III Requires an Injury in Fact.

It is now well settled that to bring a claim in federal court, a plaintiff must satisfy the "irreducible constitutional minimum" of standing, namely, by demonstrating the following three elements:

> (1) an "injury in fact" that is "concrete" and "actual or imminent";
> (2) a "fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant"; and,
> (3) "redressability – a substantial likelihood that the requested relief will remedy the alleged injury in fact."

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000) (internal quotation marks, editing marks, and citations omitted); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998).

The respondents do not claim that they are local taxpayers and do not invoke municipal taxpayer standing. *Compare Crampton v. Zabriskie*, 101 U.S.

601, 609 (1880); *see also ASARCO v. Kadish*, 490 U.S. 605, 613 (1989) (referencing *Crampton*). Instead, they assert only that each respondent "objects to, is offended by, and feels unwelcome at Board meetings because of" the town's alleged "alignment with Christianity through the Board's persistent presentation of Christian prayers." Cplt. ¶¶ 7, 8.[3] No other injury is asserted.

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[3]The relevant passages from the Complaint provide:

> 7. Plaintiff Susan Galloway is a citizen of New York and has resided in Greece since 2000, and in the greater-Rochester area for 30 years. . . . Ms. Galloway has attended numerous Town Board meetings in the past (beginning in 2005 when a friend ran for a position on the Board) – including meetings on January 16, 2007, September 18, 2007, and October 16, 2007, all of which featured a sectarian opening prayer. And Ms. Galloway plans to attend future Town Board meetings. She is Jewish, and objects to, is offended by, and feels unwelcome at Board meetings because of, the Town Board's alignment with Christianity through the Board's persistent presentation of Christian prayers.
>
> 8. Plaintiff Linda Stephens is a citizen of New York and has resided in the Town of Greece since 1970. . . . She has attended numerous Town Board meetings in the past (beginning in 2001 when she was concerned about a "Frisbee golf" course that had been erected in a local park) – including the September 18, 2007, November 20, 2007, and January 15, 2008, Town Board meetings, all of which were opened with sectarian prayers. And she plans to attend future Town Board meetings. She is an atheist, and objects to, is offended by, and feels unwelcome at Board meetings because of, the Town Board's alignment with Christianity through the Board's persistent presentation of Christian prayers.

Cplt. ¶¶ 7, 8.

B. Personal Objection or Feeling Offense, without More, Is Not an Injury in Fact.

A claim of personal offense or dismay, without more, fails the first requirement of standing, namely, a showing of injury in fact. As this Court has stated in no uncertain terms, "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co.*, 523 U.S. at 107. Plaintiffs in such cases

> fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.

Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 485-86 (1982) (emphasis omitted).

Recognition of "offended observer" standing would not only run directly contrary to this Court's teaching set forth above, it would also be profoundly inconsistent with Article III law.

For example, allowing "personal offense" to suffice would render irrelevant the entire body of taxpayer standing precedents. In that area of case law the usual rule, set forth in *Frothingham v. Mellon*, 262 U.S. 447 (1923), is that federal and state taxpayers cannot sue to challenge the use of tax money. This Court recognized a narrow exception to that rule in

Flast v. Cohen, 392 U.S. 83 (1968), which allows taxpayers to sue only to challenge specific, legislatively authorized expenditures of funds in alleged violation of the Establishment Clause. *See Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007); *ACSTO v. Winn*, 131 S. Ct. 1436 (2011). However, this Court has carefully and repeatedly insisted upon maintaining firm limits to that exception. For one thing, suits alleging violations of *other* clauses are not permitted. *E.g.*, *United States v. Richardson*, 418 U.S. 166 (1974) (no taxpayer standing to sue under Statement and Account Clause); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (no taxpayer standing to sue under Incompatibility Clause); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006) (no taxpayer standing to sue under Commerce Clause). Suits under the Establishment Clause, meanwhile, are carefully bounded. Thus, challenging the exercise of authority outside of the taxing and spending authority is not allowed. *See Valley Forge* (no taxpayer standing to bring Establishment Clause challenge to exercise of federal power under Property Clause, as opposed to Taxing and Spending Clause). Suits challenging the *use* of funds, as opposed to specifically authorized legislative spending, are not allowed. *Hein*. Suits challenging tax *credits* instead of *expenditures* are not allowed. *ACSTO*.

In short, the *Flast* exception has repeatedly been confined to its facts.

Yet "offended observer" standing would largely cast those limits to the wind. As here, plaintiffs would not need to claim taxpayer status. As here, they would not need to allege a specific legislative authorization of an expenditure. Indeed, as here, they would not need to

allege government spending at all. The taxpayers in *Valley Forge* could have had standing after all, just by visiting the location in question and alleging, as in this case, "object[ion]," "offen[se]," and "feel[ing] unwelcome" because of what they regarded as a message of "alignment with Christianity." Cplt. ¶¶ 7, 8. Ditto for the taxpayers in *Hein* and *ACSTO*. In short, the carefully bounded *Flast* exception would be a pointless irrelevancy.

This Court has never adopted offended observer standing as sufficient under Article III. That this Court has adjudicated *on the merits* cases that rested upon that theory of standing in the lower courts is beside the point. "'The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions – even on jurisdictional issues – are not binding in future cases that directly raise the questions.' *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (citations omitted)." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006).

Although lower courts have commonly recognized offended observer standing as a special rule for Establishment Clause cases, *see City of Edmond v. Robinson*, 517 U.S. 1201 (1996) (Rehnquist, C.J., dissenting from denial of certiorari), this Court is obviously not bound by those precedents.

C. There Is No Need to Create a Special Establishment Clause Exception to the Rule against "Hurt Feelings" Standing.

Nor should there be special privileges for Establishment Clause plaintiffs: "there is absolutely

no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992). As *Valley Forge* held, litigants' "claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." 454 U.S. at 487 (footnote omitted). *Accord Lujan*, 504 U.S. at 573-74 ("generally available grievance about government" is insufficient for standing); *Valley Forge*, 454 U.S. at 483 ("assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning").

Respondents may protest that absent standing here, no one could sue even for egregiously unconstitutional government acts. But this argument proves far too much. The hypothetical downside of a lack of offended observer standing is by no means unique to Establishment Clause claims. Flagrant violation of the Nobility Clause, U.S. Const. art. I, § 9, cl. 8, for example – say, by the President or Congress conferring knighthood on Bruce Springsteen – would not give standing to offended observers either. Importantly, "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger*, 418 U.S. at 227. *Accord Valley Forge*, 454 U.S. at 489 (quoting same language in denying standing to bring Establishment Clause claim). "Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England

town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts." *Richardson*, 418 U.S. at 179.

Moreover, worst case scenarios have a way of generating political consequences. As this Court observed in *Richardson*, "[s]low, cumbersome, and unresponsive" as that system "may be thought at times," "the political forum" and "the polls" remain available for the pursuit of redress. *Id.* And if worst case hypotheticals sufficed to overturn limits on standing, then *Valley Forge*, *Hein*, and *ACSTO* should have come out the other way, as little imagination is needed to conjure up unconstitutional government land transfers, workshops on religion, or expressly religiously preferential tax credits.

D. This Is Not a Case of Coerced Exposure to Objectionable Matter.

A different rule may well apply under Article III where the offended observer is coerced, in the legal sense, to view or hear the objectionable matter. Thus a program of mandatory "reeducation" – brainwashing – could give rise to an injury in fact, not so much because of the objection to the exposure as because of the *coercion* involved.

Here, however, the government requires no exposure to speech at all – attendance at town board meetings is purely voluntary. Nor does the government engage in indirect coercion, for example by requiring citizens to hear the invocations as a condition upon access to generally available public benefits like use of a park or highway, receipt of municipal services, or admission to local public schools or their programs. Nor is this a

case of mandatory indoctrination of minor children compelled to attend a government-run school. *Compare Lee v. Weisman* 505 U.S. 577, 597 (1992) (contrasting effectively mandatory school event with government session "where adults are free to enter and leave with little comment and for any number of reasons"). Nor does this case involve prisoners or others genuinely unable to avoid exposure to objectionable speech. Such cases raise concerns that go well beyond the all-too-common disagreement, however visceral or sincere, that a citizen feels upon viewing government action that is personally objectionable. "People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation." *Id.* Nor does such disagreement, whether couched as an objection, an offense, or a feeling, rise to the level of an Article III injury.

* * *

"Offended feelings" standing, while a boon for "'cause mongers,'" *Illinois Dep't of Transp. v. Hinson*, 122 F.3d 370, 373 (7th Cir. 1997), is a bad idea whose time has not come. This Court should reverse the judgment of the Second Circuit and remand for dismissal for lack of standing.

CONCLUSION

This Court should reverse the judgment of the Second Circuit.

Respectfully submitted,

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Aug. 2, 2013

AMICUS CURIAE BRIEF

No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE, NEW YORK,

Petitioner,

—v.—

SUSAN GALLOWAY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION, THE ANTI-DEFAMATION LEAGUE, AND INTERFAITH ALLIANCE FOUNDATION IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The New York Civil Liberties Union (NYCLU) is a state affiliate of the national ACLU. Since its founding in 1920, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. As organizations that have long been dedicated to preserving religious liberty and the right to participatory democracy, the ACLU and the NYCLU have a strong interest in the proper resolution of this case.

The Anti-Defamation League (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in

---

[1] Letters of consent to the filing of *amicus* briefs in support of either party or neither party have been lodged with the Clerk of the Court by both Petitioner and Respondents. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

America, and to the protection of minority religions and their adherents.

Interfaith Alliance Foundation is a 501(c)(3) non-profit organization that celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Interfaith Alliance's members across the country belong to 75 different faith traditions as well as no faith tradition. Founded in 1994, Interfaith Alliance supports people who believe that their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy and advocating for the proper boundaries between religion and government.

STATEMENT OF THE CASE

Fourteen years ago, the Town Board of Greece, New York, decided to begin opening its monthly meetings with official prayers. Pet. App. 3a. Previously, the Board had solemnized meetings with a moment of silence. *Id.*

From 1999 through June 2010, roughly two-thirds of the Board's opening prayers were expressly Christian, featuring overt references to Jesus Christ or other distinctly Christian beliefs. *Id.* at 7a. For example, one prayer was offered in the name of "Jesus Christ, who took away the sins of the world, destroyed our death, through his dying and in his rising, he has restored our life." J.A. 88a-89a. Another proclaimed, "And in the life and death, resurrection and ascension of the Savior Jesus Christ, the full extent of your kindness shown to the unworthy is forever demonstrated." *Id.* at 129a.

The Town's prayers are delivered by clergy from local houses of worship. Pet. App. 4a. Before Respondents complained in 2007, only Christian clergy were invited to perform the invocation. *Id.* Under threat of litigation, the Board relented, asking non-Christians to deliver the opening invocation on four occasions throughout 2008. *Id.* at 4a-5a. Although the Board claims that it thereafter invited religious leaders of all faiths to serve as prayer givers, every invocation from 2009 through June 2010 was delivered by a Christian clergy member. *Id.* at 5a. And 85% of the prayers during that time period were explicitly Christian. *See* J.A. 129a-43a.

Board meetings are the sole forum for residents to address the Board on matters of Town governance. Pet. App. 3a. During meetings, Board members also swear-in public employees and honor residents, including children, for academic, athletic, or civic achievements. *Id.* In addition, the Board frequently invites local scouting troops to deliver the Pledge of Allegiance, and local students routinely attend meetings to receive credit for a state-mandated civics program. *Id.*

Respondents, several non-Christian residents of Greece, filed suit in 2007, arguing that the Town's practice of opening meetings with explicitly Christian prayer violates the Establishment Clause of the First Amendment to the U.S. Constitution. *Id.* at 57a-58a. The U.S. Court of Appeals for the Second Circuit agreed, unanimously holding that the prayers are unconstitutional because they indicate an "official affiliation with a particular religion." *Id.* at 26a.

SUMMARY OF ARGUMENT

This Court has repeatedly held that the Establishment Clause requires the government to remain neutral between religion and non-religion and impartial among faiths. The sectarian prayers used to open Town Board meetings in Greece, New York, contravene this core constitutional mandate.

As a threshold matter, *Marsh v. Chambers*, 463 U.S. 783 (1983), should be overruled. *Marsh*'s approval of legislative prayer runs afoul of the neutrality principle and cannot be squared with this Court's Establishment Clause jurisprudence prior or subsequent to *Marsh*. Governmental neutrality is exceptionally important when it comes to prayer. For many devout believers, prayer is the quintessential holy act. No matter the context, it cannot be fully divorced from its religious connotations. By its very nature, governmental prayer, even if nonsectarian, places the State firmly on the side of religion. The historical prevalence of legislative prayer does not justify retreat from the well-established constitutional prohibitions on government-sponsored prayer and official favoritism of religion over non-religion.

At the very least, if the Court retains *Marsh*'s legislative-prayer exception, it should reaffirm that the exception remains exceedingly narrow and insist that legislative invocations strive for neutrality among faiths by forsaking official sectarian prayer. Whatever disagreements may exist about the reach of the Establishment Clause, this Court has vigorously and repeatedly proscribed governmental sectarianism.

Our constitutional aversion to government-sponsored sectarianism is rooted in the understanding that the State's preferential support of one sect or denomination is especially likely to undermine the dignity and free conscience of individual citizens (particularly those of minority faiths); weaken religion by relying on the government, rather than religious institutions, to spread and validate messages of faith; and engender the type of religious discord that can wreak havoc on a pluralistic republic. When legislative prayers venture into the specific religious tenets and doctrines of particular faiths, they become instruments of official denominational preference and threaten to impose these harms on individuals and the community.

Marsh was not intended to abandon the clearest command of the Establishment Clause by allowing legislative bodies to indulge in sectarian entreaties to the divine. On the contrary, in upholding the Nebraska Legislature's invocation practice, the Court notably observed that all explicit Christian references had been removed by the legislative chaplain. The Court has subsequently confirmed that this fact was central to its decision in *Marsh*.

Since *Marsh*, our nation has grown even more religiously diverse. If legislative prayers are constitutionally permissible at all, they should reflect and comply with the neutrality principle by affirmatively avoiding denominational appeals. This rule is both sensible and workable. This Court and lower courts have already distinguished sectarian terminology from nonsectarian references and

provided numerous examples of each. And many legislative bodies across the country currently require invocations to be nonsectarian.

Because Petitioner routinely opens its meetings with expressly sectarian invocations, the Town's prayer practice fails the minimum requirements of the Establishment Clause. Accordingly, the court below properly enjoined the Town's current legislative-prayer practice, and *amici* respectfully request that this Court affirm the judgment.

ARGUMENT

For more than six decades, this Court's Establishment Clause jurisprudence has generally been guided by a fundamental rule: "[T]he government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 875-76 (2005). The neutrality principle has served the Establishment Clause well because it speaks to the very harms that the First Amendment was designed to prevent. When the government engages in religious activity, such as prayer, it tends to usurp the right of individual conscience, render religion dependent on the State for its propagation, and incite religiously based civic divisiveness. To be sure, as discussed below in Part II, the danger is more pronounced and the harm more potent when the government embraces sectarian preferences, but even more inclusive, nonsectarian prayer poses a threat to religious liberty when it is sponsored by the State.

The Court's departure from this principle in *Marsh v. Chambers*, which authorized nonsectarian legislative prayer based on its "unambiguous and unbroken history of more than 200 years," 463 U.S. at 792, was deeply flawed. Because legislative prayer of any stripe violates the neutrality principle, the Court should overrule *Marsh* and deem Petitioner's prayer practice unconstitutional, regardless of the prayers' content. At a minimum, however, the Court should enforce the Establishment Clause's absolute ban on denominational preference by ensuring that legislative prayers delivered pursuant to *Marsh* are nonsectarian.

I. *MARSH* CANNOT BE RECONCILED WITH THE ESTABLISHMENT CLAUSE'S NEUTRALITY MANDATE AND SHOULD BE OVERRULED.

This Court has long recognized that the "touchstone" of the Establishment Clause "is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary*, 545 U.S. at 860 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)); *see also, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (stating that "government must pursue a course of complete neutrality toward religion"); *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 696 (1994) ("'A proper respect for . . . the Establishment Clause[ ] compels the State to pursue a course of 'neutrality' toward religion,' favoring neither one religion over others nor religious adherents collectively over nonadherents.") (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792–93 (1973)); *Sch. Dist. of*

Abington Twp. v. Schempp, 374 U.S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality."); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (holding that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers"). As the Court recently observed, "[t]he importance of neutrality as an interpretive guide is no less true now than it was . . . in *Everson*." *McCreary*, 545 U.S. at 874.

Marsh signaled a pronounced departure from this basic rule. "Legislative prayer clearly violates the principles of neutrality and separation that are embedded within the Establishment Clause." 463 U.S. at 808 (Brennan, J., dissenting). Indeed, there are few acts that could more plainly breach the neutrality mandate than government-sponsored prayer. "[P]rayer is fundamentally and necessarily religious." *Id.* at 810 (internal quotation marks omitted). At its essence, prayer "is religion *in act*." *Id.* at 811; *cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 31 (2004) (Rehnquist, C.J., concurring) (distinguishing the reference to God in the Pledge of Allegiance from the "explicit religious exercise" prohibited in *Lee v. Weisman*, 505 U.S. 577 (1992)).

Stripping an invocation of patently sectarian references, as the chaplain did in *Marsh*, 463 U.S. at 793 n.14, is insufficient to satisfy the neutrality principle. The inherently religious character of the prayer remains. It is still "a solemn avowal of divine faith and supplication for the blessings of the Almighty," and the "nature of such a prayer has

always been religious." *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962). Although prayers with more inclusive, nonsectarian content might mitigate the constitutional harms of official religious exercise, *see infra* Part II, they violate the neutrality principle nonetheless. As the Court has explained, "One timeless lesson [of the First Amendment] is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee*, 505 U.S. at 592.

Marsh's departure from prevailing Establishment Clause principles primarily rested on two pieces of historical information: an "unbroken practice" of legislative prayer for two centuries and the First Congress's vote to appoint and pay a chaplain in the same week that it voted to submit the First Amendment to the states. *Marsh*, 463 U.S. at 786-90, 794. Given this history, the *Marsh* majority reasoned, it could "hardly be thought that . . . [members of the First Congress] intended the Establishment Clause of the [First] Amendment to forbid what they had just declared acceptable." *Id.* at 790.

Even assuming the historical accuracy of the Court's assessment,[2] *Marsh*'s analytical approach

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[2] In fact, support among the Founders for legislative chaplaincies and prayer was not unanimous. James Madison, the principal architect of the First Amendment and a member of the first four Congresses, disavowed any involvement in establishing the legislative chaplaincies, reporting that "it was not with [his] approbation" that they had been set up. Letter from J. Madison to E. Livingston (July 10, 1822), *in Madison: Writings* 786, 788 (Jack N. Rakove ed., 1999). He denounced

was unsound. Relying on the acts of the First Congress to rule out particular interpretations of the Establishment Clause makes sense only if lawmakers are regarded as infallible. History has shown all too often that this is not the case: "Legislators, influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business, do not always pass sober constitutional judgment on every piece of legislation they enact." *Marsh*, 463 U.S. at 814 (Brennan, J., dissenting). The Founders and their successors were not immune to these lapses. *See Van Orden v. Perry*, 545 U.S. 677, 726 n.27 (2005) (Stevens, J., dissenting) ("The First Congress was – just as the present Congress is – capable of passing unconstitutional legislation.").

For example, the First Congress passed a law requiring that certain thefts be punished by public whipping. *Marsh*, 463 U.S. at 814 n.30 (Brennan, J., dissenting). A mere ten years after proposing the First Amendment, Congress approved the Alien and Sedition Acts, laws that are "patently unconstitutional by modern standards." *Lee*, 505 U.S. at 626 (Souter, J., concurring). And only one week after sending the Fourteenth Amendment to the States, the 39th Congress enacted a law affirming the racial segregation of Washington D.C. public schools. *Compare* Act of July 23, 1866, 14

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the congressional chaplaincy as inconsistent with the Constitution and the "pure principle of religious freedom." James Madison, *Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments.*, *in Madison: Writings*, *supra*, at 745, 762. Madison believed it to be "a palpable violation of equal rights, as well as of Constitutional principles." *Id.* at 763.

Stat. 216, *with Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Even James Madison, one of the most ardent defenders of the Establishment Clause, did not always act in accord with his conscience when it came to matters of religion. Following the lead of Thomas Jefferson, Madison staunchly refused to issue prayer proclamations during the first three years of his presidency, believing them to be a violation of the constitutional amendment that he had helped conceive. *See Lee*, 505 U.S. at 624 (Souter, J., concurring). However, "amid the political turmoil of the War of 1812," he relented and issued four different religious proclamations. *Id.* Madison later expressed deep regret about having done so, writing that the proclamations and legislative prayers were "shoots from the same [unconstitutional] root." *Id.* at 625 (internal quotation marks omitted).

"Madison's failure to keep pace with his principles in the face of congressional pressure cannot erase the principles." *Id.* Rather, it serves as a reminder that the Founders were imperfect men who, at times, failed to live up to the lofty, untested ideals embodied in the Constitution and the Bill of Rights. Like the prayer proclamations that Madison later regretted, some of these failures stemmed from weakened fortitude in the face of external pressures and trying times. Others were perhaps a product of the particular era in which they were passed, but have been recognized by future generations and this Court as both legally erroneous and morally unconscionable. Either way, these historical examples illustrate why the First Congress's conduct,

relating to legislative prayer or otherwise, should not be determinative of the Court's constitutional analysis. This is especially true where, as in *Marsh*, it results in "subverting the principle of the rule of law." *See* Michael W. McConnell, *On Reading the Constitution*, 73 Cornell L. Rev. 359, 362 (1988) (arguing that *Marsh* "clearly violates fundamental principles we recognize under the [Establishment] [C]lause").

Ultimately, the *Marsh* holding was both analytically problematic and unnecessary. Legislative bodies can easily solemnize meetings using non-religious means. *See, e.g., Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 673 (1989) (Kennedy, J., concurring in part and dissenting in part) ("I fail to see why prayer is the only way to convey these [solemnizing] messages; appeals to patriotism, moments of silence, and any number of other approaches would be as effective."). Prior to adopting its prayer practice in 1999, the Town of Greece did just that, opening meetings with a moment of silence. *See* Pet. App. 3a. There is no indication that the Town's governance suffered without official prayer, and certainly no suggestion in the record or elsewhere that the Establishment Clause needs any exception for official, government-sponsored entreaties to the divine.

II. AT A MINIMUM, LEGISLATIVE PRAYERS MUST RESPECT OUR LONGSTANDING CONSTITUTIONAL COMMITMENT TO DENOMINATIONAL NEUTRALITY.

While there has been debate about the reach of the neutrality mandate in certain contexts, few dispute that governmental sectarianism – official preference for one faith or denomination over others – is and should be forbidden. This "principle of denominational neutrality" is well recognized as "[t]he clearest command of the Establishment Clause." *See Larson v. Valente*, 456 U.S. 228, 244, 246 (1982); *see also Kiryas Joel*, 512 U.S. at 707 ("[I]t is clear that neutrality as among religions must be honored."); *Allegheny*, 492 U.S. at 605 ("Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)."); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985) ("Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."), *overruled on other grounds by Agostini v. Felton*, 521 U.S. 203 (1997); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ("The government must be neutral when it comes to competition between sects.").[3]

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[3] This understanding of the Establishment Clause has also been embraced by a number of individual justices in concurring and dissenting opinions. *See, e.g., McCreary*, 545 U.S. at 897

Marsh was not a license to violate this rule in 1983, and it should not be treated as one today. On the contrary, at a time when our nation is more religiously diverse than ever,[4] it is even more critical that this Court reaffirm our commitment to governmental neutrality among faiths. Straying from this principle now, over two centuries after the First Amendment's adoption, would render the Establishment Clause virtually meaningless and unleash the very evils that the First Amendment was designed to prevent. If the Court is not inclined to overturn *Marsh*, at a minimum, it should affirm that the Establishment Clause requires the Town of Greece to limit its invocations to those that are nonsectarian in nature.

(Scalia, J., dissenting) (rejecting view that the Establishment Clause permits "government invocation of Christianity"); *Van Orden*, 545 U.S. at 709 & n.5 (Stevens, J., dissenting) (noting the "widespread consensus" that "government may not exercise a preference for one religious faith over another"); *Kiryas Joel*, 512 U.S. at 748 (Scalia, J., dissenting) ("I have always believed that the Establishment Clause prohibits the favoring of one religion over others"); *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting) (stating that the Clause was designed to stop "[g]overnment from asserting a preference for one religious denomination or sect over others"); *Schempp*, 374 U.S. at 231 (Brennan, J., concurring) ("While our institutions reflect a firm conviction that we are a religious people, those institutions by solemn constitutional injunction may not officially involve religion in such a way as to prefer, discriminate against, or oppress, a particular sect or religion.").

[4] *See generally Amicus* Br. of Unitarian Universalist Association, *et al.*

A. Governmental Sectarianism Strikes at the Heart of the Establishment Clause.

Sectarian governmental practices are constitutionally repugnant because they violate basic notions of fairness and equality and are especially likely to trigger and exacerbate the harms of government-sponsored religion. *See, e.g.*, *McCreary*, 545 U.S. at 861 ("[W]hen the government maintains Sunday closing laws, it advances religion only minimally because many working people would take the day as one of rest regardless, but if the government justified its decision with a stated desire for all Americans to honor Christ, the divisive thrust of the official action would be inescapable."); *see also, e.g.*, *Elk Grove*, 542 U.S. at 42 (O'Connor, J., concurring) ("While general acknowledgments of religion need not be viewed by reasonable observers as denigrating the nonreligious, the same cannot be said of instances where the endorsement is sectarian . . . .") (internal quotation mark omitted); *Larson*, 456 U.S. at 245 (noting that, absent governmental sectarianism, "every denomination would be equally at liberty to exercise and propagate its beliefs," but "such equality would be impossible in an atmosphere of official denominational preference"). The primary harms associated with sectarianism fall into three basic categories.

First, sectarianism typically involves the imposition of majority-faith beliefs on adherents of minority religions, jeopardizing their right of individual conscience and free religious exercise. *See Engel*, 370 U.S. at 431 ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive

pressure upon religious minorities to conform to the prevailing officially approved religion is plain."); *cf.* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313, 320 (1996) ("[B]ecause religious choices and commitments are so important to so many individuals, and because of the history of government efforts to suppress disapproved religions, many citizens will be highly sensitive to any hint that government disapproves of their religious beliefs or even that it prefers some other set of religious beliefs.").

Second, even if adherents of the preferred faith never fall out of official favor, they are still vulnerable to the dangers of denominational bias. As Madison observed, governmental preference for one faith tends to "weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author," stimulate "pride and indolence in the Clergy," and cause "ignorance and servility in the laity." James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in Madison: Writings*, *supra* note 2, at 29, 32. History has proven that "ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." *Id.*; *see also*, *e.g.*, *Engel*, 370 at 431 ("The history of governmentally established religion . . . showed that many people had lost their respect for any religion that had relied upon the support [of] government to spread its faith.").

Third, and equally troubling, governmental sectarianism is a "flashpoint for religious animosity." *Lee*, 505 U.S. at 588. Such religious strife "is a threat to the normal political process" in a pluralistic

republic and was one of the principal evils that the Establishment Clause was intended to prevent. *Lemon v. Kurtzman*, 403 U.S. 602, 622-23 (1971); *see also McCreary*, 545 U.S. at 876 (explaining that the Establishment Clause is an important safeguard "against the civic divisiveness that follows when the government weighs in on one side of religious debate"); *Walz v. Tax Comm'n*, 397 U.S. 664, 694 (1970) (Harlan, J., concurring) ("What is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point."); *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring) ("[The Religion Clauses] seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.").

The harms of governmental sectarianism point to one inescapable conclusion: "[A] union of government and religion tends to destroy government and to degrade religion." *Engel*, 370 U.S. at 431 (detailing the historical fallout that has occurred when the government has "allied itself with one particular form of religion"). These harms are not hypothetical. They are borne out by the Founders' personal experiences and the more contemporary examples of official religious persecution in nations that fail to adhere to the principle of denominational neutrality. And the harms are evident in events today, including, for example, a well-documented wave of anti-Muslim sentiment, stoked, in part, by certain elected leaders who prey on fears of religious differences between the majority and minority faiths. *See, e.g., Awad v.*

Ziriax, 670 F.3d. 1111, 1130 (10th Cir. 2012) (upholding preliminary injunction against Oklahoma constitutional amendment that purported to "Save Our State" from a supposed onslaught of Sharia law).

B. The Establishment Clause Prohibits the Town of Greece from Opening Meetings with Sectarian Prayer.

Given the quintessentially religious nature of prayer, it is particularly important – in the very limited circumstances in which the Court has authorized official invocations – that the government comply with the longstanding ban on sectarianism. To conform to this rule, legislative prayers must avoid invoking the religious tenets of any specific faith. Although the outcome in *Marsh* respected this line, Petitioner's prayers plainly do not.

1. Sectarian legislative prayer is incompatible with Marsh *and the principle of denominational neutrality.*

a. *Marsh* contemplated that legislative prayers would not be specific to one faith.

Prior to the Court's consideration in *Marsh*, the chaplain of the Nebraska Legislature had regularly opened sessions with explicitly Christian invocations. *Marsh*, 463 U.S. at 793 n.14. As is often the case with official sectarian practices, however, several non-Christian legislators found these prayers disquieting. *Id.* When a Jewish senator expressed his discomfort to the chaplain in 1980, the chaplain "removed all references to Christ" in future prayers. *Id.* By the time the case was heard by the Court, the record reflected that the prayers had been

"nonsectarian" for several years—a key point of fact that the Court confirmed during oral argument and specifically noted in its opinion. *See id.*; Oral Argument at 36:40, Marsh v. Chambers, 463 U.S. 783 (1983) (No. 82-23), *available at* http://www.oyez.org/cases/1980-1989/1982/1982_82_23 (confirming that the chaplain had "devoided himself of the uniquely Christian aspect" of the prayers after receiving a complaint).

These facts belie Petitioner's claim that *Marsh* authorized sectarian prayer. Rather, they reflect the Court's view of legislative prayer as "conduct whose . . . effect . . . harmonize[d] with the tenets of some or all religions" and "a tolerable acknowledgement of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792 (alteration in original) (internal quotation marks omitted). The *Marsh* facts also informed the Court's conclusion that the Nebraska prayers did not "proselytize or advance any one, or . . . disparage any other, faith or belief." *Id.* at 794-95.

Since *Marsh*, this Court has emphasized that the decision was predicated, at least in part, on the nonsectarian nature of the prayers. Distinguishing between "a specifically Christian symbol, like a crèche, and more general religious references, like the legislative prayers in *Marsh*," the Court explained in *Allegheny* that *Marsh*'s legislative invocations did not violate the constitutional requirement of nonsectarianism because the "particular chaplain had removed all references to Christ." 492 U.S. at 603 (internal quotation marks omitted); *see Van Orden*, 545 U.S. at 688 n.8 (plurality opinion) (suggesting that, despite explicitly

Christian prayers in the past, no ongoing violation occurred because the "chaplain removed all references to Christ the year after the suit was filed"); *Grand Rapids*, 473 U.S. at 390 n.9 ("[T]his Court has held that prayers conducted at the commencement of a legislative session do not violate the Establishment Clause, in part because of long historical usage and lack of particular sectarian content."). In so doing, the Court reiterated that "[h]owever history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed." *Allegheny*, 492 U.S. at 603.

On this issue, the analysis in *Allegheny* and other cases are, *amici* acknowledge, dicta. But that does not mean the Court should dismiss it out of hand, as Petitioner urges. Pet. Br. 24-25. The dicta is persuasive precisely because it rests on, and reflects, our strong "constitutional tradition . . . [that has] ruled out of order government-sponsored endorsement of religion – even when no legal coercion is present . . . – where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." *See Lee*, 505 U.S. at 641 (Scalia, J., dissenting).

b. Denominational legislative prayer epitomizes the harms of governmental sectarianism.

The facts underlying *Marsh* illustrate the harm to individual conscience inflicted by governmental sectarianism. As in *Marsh*, the

imposition of prayers that invoke Jesus Christ is likely to offend the beliefs of the Jewish legislator or the Muslim or Sikh citizen in attendance. Simply put, sectarian prayers pressure minority-faith adherents to take part in religious exercises that are incompatible with their beliefs.

Those who resist this pressure do not escape injury, especially in the more coercive context of local governmental meetings. By declining to participate in Christian prayer during meetings, local residents risk offending the very officials from whom they must seek relief or action on any number of problems or issues.

Further, to the extent that legislative invocations serve to unite those who attend governmental meetings,[5] minority-faith adherents who cannot participate in sectarian prayer are excluded from, and thus effectively denied, the shared benefit of a solemnizing practice. Madison anticipated and denounced this very harm, observing that "[t]he tenets of the chaplains elected shut the door of worship ag[ain]st the members whose creeds & consciences forbid a participation in that of the majority. . . ." Madison, *Monopolies.*, in *Madison: Writings*, *supra*, note 2, at 763.

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[5] *See, e.g.*, Nat'l Conference of Community & Justice (NCCJ), *When You Are Asked to Give Public Prayer in a Diverse Society: Guidelines for Civic Occasions* 2 (instructing that civic prayer should unite those in attendance "in a common concern," rather than dividing the community, which can occur "when forms or language exclude persons from faith traditions different than that of the speaker"), *available at* http://www.nccj.org/whatwedo/documents/PUBLICPRAYERGUIDELINES81610docx.pdf (last visited Sept. 19, 2013).

Not surprisingly, the isolating influence of sectarian legislative prayer has caused considerable acrimony and divisiveness, both in the Town of Greece itself and nationwide. *See, e.g.*, Andy Dillon, *Exclusivity in Diversity's Clothing*, Indymedia (Aug. 18, 2013), http://rochester.indymedia.org/node/99429 (describing anonymous letter, which was signed as "666" and sent to a plaintiff in this case, stating: "If you feel 'unwanted' at the Town of Greece meetings, it's probably because you are"; "Stay away from town meetings & do everyone a favor"; and "Be careful.....lawsuits can be detrimental") (PDF of letter available at http://rochester.indymedia.org /sites/default/files/%27666%27%20letter_2.pdf); Greg Stohr, *"Let Us Pray" Before Town Council Becomes High Court Case*, Bloomberg News (July 26, 2013), http://www.bloomberg.com/news/2013-07-26/let-us-pray-before-town-council-begins-is-high-court-case.html (same plaintiff had her mailbox pulled out of the ground and defaced); *see also, e.g.*, Stephen Clark, *Hartford's Inclusion of Muslim Prayers in Council Meetings Sparks Outrage*, FoxNews.com (Sept. 8, 2010), http://www.foxnews.com/politics/2010/09/08/hartford-councils-inclusion-muslim-prayers-sparks-outrage/ (noting that council staff members "were bombarded by hate mail overnight" after announcing they had invited local Muslim leaders to offer opening prayers); Howard Friedman, *County Board Moves to Moment of Silence; Generates Strong Objections*, Religion Clause (Feb. 12, 2009), http://religionclause.blogspot.com/2009/02/county-board-moves-to-moment-of-silence.html (revealing that county supervisor who had initiated change in board's practice of opening with explicitly Christian prayers had received death threats); Robert Patrick

& Laura Green, *Rosenauers' Home, Truck Vandalized: The Jewish Family Suing the Manatee County School Board Over a Prayer Issue Calls Friday's Attack a Hate Crime*, Sarasota Herald-Trib. (Apr. 13, 2004), at A1 (reporting that Jewish family who objected to Christian prayers by local school board had received threatening phone calls and that their house and cars were vandalized over Passover with red paint); Christina Lee Knauss, *A Quiet Life No More*, The State (Sept. 19, 2004), at B2 (recounting experience of Wiccan citizen who objected to a South Carolina town's Christian prayer practice and, as a result, suffered harassment, threats, and violence, including a home invasion during which her parrot was beheaded and note left warning, "You're next!" as well as other incidents in which her pet cats were killed and her dog beaten).

2. The Town's prayers violate the principle of denominational neutrality.

Over two-thirds of the Town's opening invocations throughout a period of eleven years were overtly Christian in that they referred to Jesus, Christ, or other exclusively Christian tenets. *See* Pet. App. 7a. Over those eleven years, just four invocations were delivered by non-Christians; and those four prayer givers were invited only in response to Respondents' threat of litigation. *Id.* at 4a-5a. In the eighteen months before the record closed in this case, the proportion of Christian prayers reached 85%. *See* J.A. 129a-43a. Individually and collectively, these Christian prayers run afoul of the Establishment Clause.

Petitioner and its *amici* offer several arguments for why the Town's sectarian practice

should nevertheless be permitted. But neither the absence of extensive, vitriolic proselytizing in Greece nor the Town's decision to rotate delivery of the prayers among local clergy can cure the constitutional infirmity of the practice.

a. Legislative prayers that invoke the tenets of a particular religion run afoul of the sectarianism ban and *Marsh* even if they do not preach vitriol or aggressively proselytize.

Petitioner's observation that its prayers do not "preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like," Pet. Br. 3, 12-13, 20, does not alter the constitutional analysis.[6] Such prayers would unquestionably be sectarian, but so are prayers that appeal to the canons and divine beings of one specific faith.

No one disputes that the Town's prayers were offered repeatedly and routinely in the name of Jesus Christ and included other references to distinctly Christian beliefs. As Respondents demonstrate, this sectarian prayer practice bears all the hallmarks of religious coercion. *See* Resp. Br. 21-30. Under the watchful eye of Board members, those with business before the Board must decide between risking offense to officials who obviously support the Christian prayer and taking part in a religious exercise that contravenes their own beliefs. Minority-faith

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[6] Petitioner's suggestion that this Court uphold the Town's prayers because they are not demeaning of other faiths or aggressively proselytizing directly conflicts with its claim that the Court must ignore the content of challenged prayers. *See* Pet. Br. 13, 17, 18.

adherents who step out during the prayer or resist the pressure to participate in the prayer are revealed immediately as non-Christians; there is no hiding at meetings typically attended by ten people. C.A. App. A777, A929.

Putting aside the question of whether attendees are coerced into taking part in these prayers,[7] offering them in the name of Jesus, at the very least, openly prefers and thereby advances Christianity over other faiths. And it operates as an impediment to participation for the Sikh citizen scheduled to present a zoning application to the Board, the Muslim police officer awaiting his swearing-in ceremony, or the Jewish student attending the Board meeting as part of the state-mandated civics program. Isolating members of minority faiths in this way is unconstitutional, and it is a recipe for religious divisiveness.

Marsh does not counsel otherwise. The decision evinced respect for the fundamental principle of nonsectarianism by limiting permissible prayers to those that do not "proselytize or advance any one, or to disparage any other faith, or belief." 463 U.S. at 794-95. Whether or not Petitioner's prayers "preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like," religious exercises that invite residents to pray in the name of Jesus simply do not fall within the

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[7] This Court clarified decades ago that the Establishment Clause "does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." *See Engel*, 370 U.S. at 430 (quoted in *Wallace*, 472 U.S. at 60 n.51).

nonsectarian legislative tradition embraced by *Marsh*.

b. Rotating delivery of the prayers among local clergy does not cure the Establishment Clause violation.

Petitioner's argument that the prayers fall under the Court's public-forum jurisprudence or otherwise constitute private speech, *see* Pet. Br. 21, 41, 52, is not supported by the record or the law. Though Petitioner now tries to dissociate from the prayers, Pet. Br. 53, they clearly remain the Town's own. The prayers are specifically authorized by the Board for the sole purpose of solemnizing its meetings. A Board employee selects and invites the prayer giver, whom the Town designates its "chaplain of the month." Pet. App. 4a. And the Board lists the prayer on its official agenda. *Id.* at 29a.

Moreover, while the Board does not select the particular words used by the prayer giver, through these actions, it strongly "invites and encourages religious messages." *See Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 306-07 (2000) (rejecting claim that prayers were not attributable to the school merely because the "words used by the speaker [we]re not determined by [student] votes"). As noted above, those who deliver the invocation consistently abide by the Board's expectation of prayer. Accordingly, unlike the meetings' separate "public forum" period, during which Town residents may directly petition the Board, C.A. App. A779, invocations given by the Town's official "chaplain of the month" are plainly delivered on the Board's

behalf and retain the imprimatur of the Town.[8] The prayers must, therefore, comply with the principle of denominational neutrality.

Rotating the invocations among local clergy violates this mandate if the clergy are allowed to deliver sectarian prayers, even if some of the prayers end up being expressly Jewish, Muslim, or representative of any other faith. Last month's preference for Judaism will be of little comfort to the Jewish homeowner who must endure explicitly Christian prayer at this month's Board meeting in order to apply for a zoning permit.

So, too, a Christian student receiving an award from the Board may regard a Muslim prayer as intolerable, despite a string of Christian prayers in the months before and plans for more Christian prayers thereafter. For example, in Hartford, Connecticut, when city council leaders invited local imams to deliver opening invocations as "a break from the typical start of meetings with Christian prayers or occasionally an invocation by a rabbi," officials were "bombarded with hate mail overnight." Clark, *supra* (quoting one objector as declaring, "'I think opening with Islamic prayer is opening up for more people to go straight to hell'"). Because of the community's furor, the city council rescinded its invitation to the Muslim religious leaders. *See*

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[8] This Court has never questioned the assumption that prayers delivered by invited guests at State events are official in character. *See Lee*, 505 U.S. at 581, 587 (treating prayer delivered by invited clergy during public-school graduation as governmental practice); *see also Santa Fe*, 530 U.S. at 306-07; *Marsh*, 463 U.S. at 794 n.18 (stating that some legislatures use guest chaplains, with no suggestion that such prayers should be considered private speech).

Everton Bailey, Jr., *Connecticut Muslims Ask for Equality from City Council*, Associated Press, Sept. 14, 2010.

In any event, Petitioner concedes that minority-faith residents are much more likely to be put in this untenable position because the vast majority of the community and clergy are Christian. Pet. Br. 5. Indeed, in the eighteen months before the record closed, residents and others attending Town Board meetings would have encountered explicitly Christian prayers 85% of the time. *See* J.A. 129a-43a.

Justice Brennan highlighted this dilemma in *Schemmp*, addressing the public schools' argument that daily Bible reading "prefer[red] no particular sect or sects at the expense of others" because the readings alternated between several different versions of the Bible:

> To vary the version as the Abington and Baltimore schools have done may well be less offensive than to read from the King James version every day, as once was the practice. But the result even of this relatively benign procedure is that majority sects are preferred in approximate proportion to their representation in the community and in the student body, while the smaller sects suffer commensurate discrimination. So long as the subject matter of the exercise is sectarian in character, these consequences cannot be avoided.

Schempp, 374 U.S. at 283 (Brennan, J., concurring).

Petitioner dismisses these concerns as the price that non-Christians must pay for living in a religiously homogenous town, explaining that "these variations in prayer practices merely reflect the freely held and constitutionally protected religious beliefs and opinions of the people who live in a particular locality . . . ." *See* Pet. Br. 5. But tying the content of official prayers to religious demographics is no different than holding an unconstitutional majoritarian election on the question of sectarian prayer. *See Santa Fe*, 530 U.S. at 316; *see also W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."). In the end, government officials in both cases, using the authority of the State, empower the majority to "subject [residents] of minority views to constitutionally improper messages." *See Santa Fe*, 530 U.S. at 316.

The harm of these sectarian practices is considerable. Those who do not follow the specific faith promoted in the government's prayer are unduly burdened in matters of individual conscience, rendered second-class citizens, and isolated from democratic participation for that meeting—setting the stage for division in the community along religious lines.

The religious beliefs and expression of the clergy members of Greece, New York, are unquestionably protected by the Free Exercise

Clause. Free religious exercise, however, has "never meant that a majority could use the machinery of the State" to impose its beliefs on the minority. *See Schempp*, 374 U.S. at 226.

C. A General Prohibition on Sectarian Legislative Prayer Is Sensible and Workable.

The wisest and most constitutionally faithful standard for legislative prayer is a prohibition on all legislative invocations. *See supra* Part I. Short of imposing this bright-line rule, however, any test should give full effect to the longstanding prohibition on denominational preference. A ban on legislative prayers that are sectarian – those that invoke or specify details upon which believers in a higher power are known to disagree – can, at the very least, mitigate the harms caused by the practice. Notwithstanding the objections of Petitioner and its *amici*, such a rule has been proven workable by the experience and practices of courts and legislatures across the country. Petitioner's only real alternative is to propose a hands-off approach that would permit any and all government-sponsored prayer, no matter how rancorous, triumphalist, and disparaging of other faiths and beliefs. The First Amendment does not permit, and certainly does not compel, such a result.

1. Courts are well equipped to enforce the ban on sectarian prayer.

Petitioner's argument that judges will be required to conduct an in-depth theological analysis to enforce a ban on sectarian legislative prayer, Pet. Br. 6, 42-44, is belied by the experience of this Court

and the lower federal courts. In *Lee*, the Court had little difficulty differentiating between sectarian and nonsectarian prayer. While sensibly rejecting the claim that official nonsectarian prayer was constitutionally permissible, the Court recognized that sectarian prayer "uses ideas or images identified with a particular religion," noting that "explicit references to the God of Israel, or to Jesus Christ, or to a patron saint" would render prayers sectarian. *Lee*, 505 U.S. at 588-89. *See also id.* at 641 (Scalia, J., dissenting) (defining sectarian endorsement).

In various other cases, the Court has, with similar ease, identified religious expression and tenets specific to one faith. *See, e.g.*, *McCreary*, 545 U.S. at 897 (Scalia, J., dissenting) (detailing history of public prayer and proclamations that reference "God, but not Jesus Christ"); *Elk Grove*, 542 U.S. at 42 (O'Connor, J., concurring) (reference to Jesus or Vishnu would be sectarian but a "general" reference to God is not); *Allegheny*, 492 U.S. at 601 ("Glory to God for the birth of Jesus Christ" was a "patently Christian message"); *id.* at 605 n.55, 611 (characterizing the Trinity or the divinity of Jesus as "exclusively Christian creeds" and deeming the view that Jesus is the Messiah a "specifically Christian belief"); *Marsh*, 463 U.S. at 793 n.14 (prayers with all references to Christ removed were "nonsectarian"); *see also, e.g.*, *Clay v. United States*, 403 U.S. 698, 702-03 (1971) (characterizing a belief in "Allah as the Supreme Being" as a "basic tenet[ ] of the Muslim religion").

With this guidance, the lower courts have generally had no problem identifying sectarian prayer. *See, e.g.*, *Joyner v. Forsyth Cnty.*, 653 F.3d

341, 349-50 (4th Cir. 2011) (prayers were sectarian where they referenced Jesus, Jesus Christ, the Savior, the Cross of Calvary, the Virgin Birth, the Gospel of the Lord Jesus Christ, and Jesus Christ, Thy Son and our Savior), *cert. denied*, 132 S. Ct. 1097 (2012); *id.* at 364 (Niemeyer, J., dissenting) ("To be sure, a prayer that references Jesus is sectarian."); *Hinrichs v. Bosma*, 440 F.3d 393, 395 (7th Cir. 2006) ("identifiably Christian" prayers included "supplications to Christ"), *vacated on standing grounds*, 506 F.3d 584, 587 (7th Cir. 2007) ("overtly Christian" prayers included those that quoted verses from the New Testament, or referred to the "saving power of Jesus Christ," "our lord and savior Jesus Christ," and "Jesus Christ as the son of God") (internal quotation marks omitted); *Simpson v. Chesterfield Cnty. Bd. of Superv'rs*, 404 F.3d 276, 284 (4th Cir. 2005) (prayers that "refrain from using Christ's name" or "any denominational appeal" are nonsectarian); *Wynne v. Town of Great Falls*, 376 F.3d 292, 300 (4th Cir. 2004) ("The prayers sponsored by the Town Council have invoked a deity in whose divinity *only* those of the Christian faith believe."); *Santa Fe*, 530 U.S. at 299 n.7 ("The graduation prayers at issue in the instant case, in contrast, are infused with explicit references to Jesus Christ and otherwise appeal to distinctively Christian beliefs." (quoting district court order)).

Although there may be some hypothetical, gray areas at the margins of the ban on sectarian prayer,[9] the Court's "jurisprudence in this area is of

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[9] While the U.S. Court of Appeals for the Eleventh Circuit professed an inability to distinguish sectarian prayers from nonsectarian prayers, that court notably conceded that the

necessity one of line-drawing." *See Lee*, 505 U.S. at 598.[10] The real-world occasions of uncertainty, however, will be exceedingly rare. In any event, no such line-drawing is necessary in this case because the prayers regularly used by the Town of Greece to open its meetings are unquestionably Christian.

2. Legislative bodies across the country have successfully adopted and enforced invocation policies that promote and require nondenominational prayer.

Numerous legislative bodies across the country have voluntarily and successfully adopted invocation policies that strongly urge or require invocations to be nonsectarian or nondenominational, dispelling any concerns about the workability of a ban on sectarian legislative prayer. There is no evidence that these policies have been difficult to enforce, created confusion, or required governmental officials to become theologians.

For example, pointing to the "religious diversity of our membership," the Colorado House of

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nonsectarian nature of prayers is "one factor" in a "fact-intensive analysis." *See Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1271 (11th Cir. 2008).

[10] If line-drawing is a concern, the suggestion of Petitioner and its *amici* that the Court prohibit only proselytizing prayers, *see, e.g.*, Pet. Br. 38; *Amicus* Br. of Chaplain Alliance for Religious Liberty (CARL) 3, offers no relief. Quite the contrary: The proposed proselytizing test would require courts to delve into and analyze the content of prayers and draw lines to a greater extent than an outright ban on sectarian references, which can be enforced by a superficial screening for discrete references and terms that are associated with any particular faith. And the sectarian ban has the added benefit of addressing more directly all of the harms of governmental sectarianism.

Representatives instructs guest prayer givers to "keep your prayer or thought-for-the-day *non-sectarian and non-political* so that all of those present may benefit from your words." Letter from Lois Court, Chair of Colo. House Servs. Comm., to Pastor Rick Long, Grace Church of Arvada (Dec. 21, 2012).[11] Similarly, the Illinois House of Representatives requires that prayers be "nonsectarian." Letter from Sally Smith, Clerk of Ill. H.R. on Confirmation of Invocation (May 6, 2013). Prayer givers are informed that prayers "should not make reference to religious figures that are unique to any one religion, or make any other denominational appeal" out of respect for "the numerous different faiths practiced by our members and constituents." *Id.* Michigan's guidelines for legislative prayer state that the prayer "shall be general in nature." Michigan Legislative Handbook & Directory, 96th Legislature, 2011-2012, 153, http://www.senate.michigan.gov/other/LegHandbookComp.pdf. The Ohio Senate advises that prayers "should be non-denominational, non-sectarian and non-proselytizing." Memorandum from Matthew T. Schuler, Clerk, to Senate Offices on Ohio Sen. Opening Prayer Guidelines (n.d.). The Nebraska Legislature also now informs guest prayer givers that the prayer "should be nondenominational." Memorandum from Clerk of the Nebraska

[11] All of the state policies cited herein are publicly available and have been obtained from the relevant state agencies. Copies can be provided to the Court at the Court's request.

Legislature's Office to Chaplain of the Day on Guidelines to Follow (n.d.).[12]

These policies are sensitive to the harms of official sectarianism and are consistent with the legislative-prayer guidance provided by the National Conference of State Legislatures (NCSL) and the National Conference of Community and Justice (NCCJ) (formerly known as the National Conference of Christians and Jews). According to NCCJ, "[p]rayer on behalf of the entire community should be easily shared by listeners from different faiths and traditions." NCCJ Guidelines, *supra* note 5, at 2. Thus, NCCJ defines "Inclusive Public Prayer" as prayer that is "nonsectarian, general and carefully

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[12] The federal government also encourages chaplains to ensure that prayers are inclusive. The House Guidance for Guest Chaplains reminds prayer givers that "the House of Representatives is comprised of Members of many different faith traditions" and instructs that, among other limitations, "[t]he prayer must be free . . from sectarian controversies . . ." *See* Resp. Br. 49 & 1a.

In addition, the U.S. military requires chaplains to provide for the religious and spiritual needs of the entire community, not only those who share their particular faith. Although Petitioner's *amici*, CARL, suggests that military chaplains have a robust right to perform their duties "according to the manner and forms" of the chaplains' personal faith, *Amicus* Br. of CARL, at 11-13, that is true only when the chaplains are ministering to members of their own faith community. Outside the context of faith-specific worship, military chaplains are required to support an environment of religious pluralism. *See, e.g.*, U.S. Dep't of the Navy, SECNAV Instruction 1730.7D, 5.e.2 (2008) (parenthetical) ("[A]s a condition of appointment, every [chaplain] must be willing to function in the diverse and pluralistic environment of the military, with tolerance for diverse religious traditions and respect for the rights of individuals to determine their own religious convictions.").

planned to avoid embarrassments and misunderstanding," enabling "people to recognize the pluralism of American society." *Id.*

To that end, NCCJ recommends that civic prayer givers use "universal, inclusive terms for deity rather than particular proper names for divine manifestations." *Id.* Examples of inclusive opening terms include "Almighty God," "Our Maker," "Source of All Being," "Creator God," and "Creator and Sustainer," while universal closing appeals include "Hear Our Prayer," "May Goodness Flourish," or "Amen." *Id.* NCSL likewise recommends that legislative prayer givers "use common language and shared symbols" and "[i]n opening and closing the prayer, . . . be especially sensitive to expressions that may be unsuitable to members of some faiths." National Conference of State Legislatures, *Prayer Practices, in Inside the Legislative Process* (2010), http://www.ncsl.org/documents/legismgt/ILP/02Tab5Pt7.pdf. *See also* Memorandum from Debbie Brown, Fla. Sen. Sec'y to All Senators on Chaplains for 2013 Season (Jan. 17, 2013) (advising that opening prayers should use "universal, inclusive terms for the deity rather than proper names for divine manifestations" because the "the [Florida] Senate includes members of many faiths").

With similar policies in place, legislative bodies can respect the Establishment Clause ban on sectarianism without having to review every prayer in advance. Individual prayer givers may occasionally transgress these boundaries, but officials can easily deal with these breaches by, for example, admonishing repeat offenders and, if need be, eliminating them from the list of eligible prayer

givers. Judicial intervention would be necessary if, and only if, legislative bodies fail to take reasonable steps to enforce their policies and avoid frequent violations. Adopting these sensible, workable policies, legislatures can fulfill their constitutional obligation to ensure denominational neutrality.

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

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Dated: September 23, 2013

AMICUS CURIAE BRIEF

No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEVENS,

Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned to ensure maximum freedom of religion for all, regardless of political correctness.

STATEMENT OF THE CASE

The Town of Greece allows citizen volunteers from any faith tradition or no faith tradition to open town board meetings with an invocation to solemnize the proceedings. Pet. App. 29a. Those who have most recently given prayers at meetings include representatives from a Mormon church, the Vietnamese Buddhist Association, two Jehovah's Witness congregations, the Bahá'í faith, a "Wiccan High Priest," a number of Catholic churches, and several Protestant churches from a wide range of denominations, a Jewish layman, and an individual whose church is listed as "Cherokee Indian," C.A. App. A1053-55.

The Town has never rejected a request from any citizen to deliver an invocation, with atheists and non-believers welcome to do so as well. Pet. App. 20a. The Town has never established any guidelines concerning the content of any of the prayers, nor has ever asked to review the wording of any prayer prior to its delivery. Pet. App. 29a-30a.

When Respondents complained to Town officials starting in September 2007 that the prayers "aligned the town with Christianity" and "were sectarian rather than Secular," Town officials explained in

response that anyone could volunteer to deliver the opening prayer and that the Town would not police the content of the prayers offered. Pet. App. 8a.

Respondents filed suit against the Town in February 2008, alleging that the Town's procedure for selecting prayer-givers unconstitutionally "prefer[red] Christianity over other faiths," and that the Town unconstitutionally permitted individual citizens to deliver "sectarian" prayers. Pet. App. 57a-58a.

The District Court found no evidence that the Town ever "intentionally excluded [members of] non-Christian faiths from offering prayers." Pet. App. 74a. The court also found "no indication that the Town established its unwritten policy of having prayer before meetings for an improper purpose." Pet. App. 121a.

The court further observed that "[a]ny analysis of the constitutionality of legislative prayer necessarily begins with" this Court's decision in *Marsh v. Chambers*. Pet. App. 79a. The court recognized that this Court affirmed legislative-prayer practices in *Marsh* based on the unbroken history of legislative prayer in the United States. Pet. App. 79a-82a. The court concluded that legislative prayer was an "exception to the *Lemon* test, based primarily if not exclusively on the long history of legislative prayer in Congress, which is often overtly sectarian." Pet. App. 127a.

The District Court consequently ruled that the Town's board meeting prayer practices did not

violate the Establishment Clause, granting summary judgment in favor of the Town. Pet. App. 78a.

On appeal, the court below reversed the grant of summary judgment because, in its view, "the town's prayer practice had the *effect*, even if not the purpose, of establishing religion." Pet. App. 10a. The court found that most of the prayers "contained uniquely Christian references," and at times were often phrased in the "first person plural," such as "let 'us' pray." Pet. App. 20a, 23a. The court concluded that the "impression, created by the steady drumbeat of often specifically sectarian Christian prayers, that the town's prayer practice associated the town with the Christian religion" violated the Establishment Clause, even though "individuals from other faiths [sometimes] delivered the invocation." Pet. App. 22a.

SUMMARY OF ARGUMENT

The endorsement test really only involves subjective, conclusory labeling rather than an analytical tool that helps to resolve the legal issues in Establishment Clause cases. And frankly that is true of the three-pronged test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) as well. Several members of this Court have expressed similar complaints about these old standards over the years.

The text of the Constitution itself, and the historical context informing the meaning of the words used, are the primary governing sources for interpreting the rights of the American people recognized in our founding document. We submit that this Court should

follow the example of its recent decision in *District of Columbia v. Heller,* 554 U.S. 570 (2008), and in the opinion of the lower court affirmed in *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), and return to the fundamentals in regard to the text and history of the Establishment Clause as well.

At the time the First Amendment was adopted, the countries of Europe each maintained their own preferred "Establishment of Religion", which meant an official government religion enforced by laws requiring attendance at the official church, regular contributions to it, and other preferences in law for members of that church. These establishment policies all involved government *coercion* to force citizens to support the one favored church. Almost all of the American colonies had such establishments as well, with legal compulsion or coercion as their hallmark.

These practices, and anything like them involving coercion in regard to religion, are what the framers meant to prohibit in adopting the Establishment Clause, for this is what an Establishment of Religion meant at the time. They did not mean, however, to prohibit any voluntary, public, religious speech, or religious expression or symbolism, which do not involve any such coercion.

On this basis, we urge this Court to adopt a new standard evaluating alleged Establishment Clause violations based on whether the challenged policy, practice, or action involves coercion in regard to religion. With such a clear, simple standard rooted in

the text of the Constitution and its surrounding history, this case is easily resolved.

The voluntary, rotating, legislative prayers offered by citizens of the Town of Greece to open Town Board meetings do not involve an unconstitutional establishment of religion because they do not involve coercion of any sort. They merely involve voluntary speech, which is not coercive in any way. Those hearing the prayers remain entirely free to accept or reject what they hear, in whole or in part, as they each choose. No one is forced or coerced to accept or reject or believe or do anything. The Town of Greece legislative prayers do not involve anything like the coercive historic practices of religious establishments known by the Founders, which is what they were prohibiting with the term "Establishment of Religion."

ARGUMENT

I. ESTABLISHMENT CLAUSE CASES SHOULD BE GOVERNED BY THE COERCION TEST, WHICH IS FAITHFUL TO THE TEXT AND HISTORY OF THE ESTABLISHMENT CLAUSE ITSELF.

The text of the Constitution itself, and the historical context informing the meaning of the words used, are the primary governing sources for interpreting the rights of the American people recognized in our founding document. A recent example of such fundamental Constitutional analysis is provided in *District of Columbia v. Heller,* 554 U.S. 570 (2008), and in the opinion of the lower court affirmed in *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

We submit that this Court should return to the fundamentals in regard to the text and history of the Establishment Clause as well. The endorsement test really only involves subjective labeling rather than an analytical tool that helps to resolve the legal issues. And frankly that is true of the three-pronged test in *Lemon v. Kurtzman,* 403 U.S. 602 (1971) as well. What the principal and primary purpose and effect of a challenged policy or action is, or what entanglement is "excessive", or what involves an "endorsement" of religion rather than an accommodation, really just involves slapping a conclusory label on a decision reached on other considerations. Several members of this Court have expressed similar complaints about these old standards over the years.[2]

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[2] *Wallace v Jaffree,* 472 U.S. 38, 110-11 (1985)(Rehnquist, J., dissenting)(providing examples of the difficulty the Court has had in "making the *Lemon* test yield principled results," adding that the *Lemon* test is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results."); *Committee for Public Educ. v. Regan,* 444 U.S. 646, 662 (1980)(Under *Lemon* the Court has "sacrifice[d] clarity and predictability for flexibility"); *County of Alleghany v. American Civil Liberties Union,* 492 U.S. 573,656 (1989) (Kennedy, J. concurring in the judgment and dissenting in part)("Substantial revision of our Establishment Clause doctrine may be in order"); *Aguilar v. Felton,* 473 U.S. 402, 429 (1985)(Justice O'Connor dissenting)(expressing "doubts about the entanglement test"); *Roemer v. Board of Public Works,* 426 U.S. 736, 738 (1976)(White, J., concurring in the judgement)("I am no more reconciled now to *Lemon I* than I was when it was decided....The threefold test of *Lemon I* imposes unnecessary, and...superfluous tests for establishing [an Establishment Clause violation]; *Edwards v. Aguillard,* 482 U.S. 578, 636 (1987)(Scalia, J. dissenting)("pessimistic evaluation...of the totality of *Lemon* is particularly applicable to the 'purpose'

What is needed are clear, distinguishing, legal principles by which alleged Establishment Clause violations can be measured. We submit that the text and history of the Establishment Clause provides precisely such principles. As Justice Brennan said in *Abington School District v. Schempp,* 374 U.S. 203, 294 (1963)(concurring), "The line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers." The Coercion Test involves precisely that line and that test arising out of the text and history of the Establishment Clause itself.

A. The Text and Associated History of the Establishment Clause Show That Coercion Is a Necessary Element of An Establishment Clause Violation.

The text of the First Amendment states, "Congress shall make no law...respecting an Establishment of Religion...." That phrase "Establishment of Religion" had a particular meaning at the time of the Constitution.

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prong."); *See also* Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication,* 61 Notre Dame L. Rev. 311, 316-317 (1986); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. Pit. L. Rev. 673, 681 (1980)(noting "the absence of any principled rationale" in the Court's Religion Clause jurisprudence); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court,* 24 Vill. L. Rev. 3, 20 (1978).

At the time the First Amendment was adopted, the countries of Europe each maintained their own "Establishment of Religion," which meant an official government religion enforced by laws requiring attendance at the official church, regular contributions to it, and other preferences in law for members of that church. These establishment policies all involved government *coercion* to force citizens to support the one favored church, whether Catholic, or Baptist, or Puritan, or whatever.

Almost all of the American colonies had such establishments as well, with legal compulsion or coercion as their hallmark. 6 W. & A. Durant, *The Story of Civilization* 208-220, 501-506, 523-601, 631-641 (1957); L. Pfeffer, *Church, State and Freedom* 20-30 (rev. 1st ed. 1967). Professor Joseph Brady, in a seminal historical work on the Establishment Clause, quotes historian Marcus W. Jernegan regarding the typical laws involved in state religions:

> "The general rule in those colonies having an established church was to require dissenters to support it by paying tithes or taxes, and also to attend the official church services under penalty. They were also frequently required to submit to various tests or oaths, and to subscribe to the creeds and catechisms of the established church. Sometimes the right to settle in a colony, or the privilege of naturalization, or citizenship, or the right to vote and hold office, depended on submission to religious tests."

J. Brady, *Confusion Twice Confounded: The First Amendment and the Supreme Court* 6-7 (1954). *See also* L. Levy, *The Establishment Clause: Religion and the First Amendment* 4 (1987).

In Virginia, the home of Jefferson, Madison, and Washington, the Anglican Church was adopted as the Established church in the Colony's original charter in 1606. That charter required all ministers in the Colony to preach Christianity according to Anglican doctrines. L. Levy, *supra,* n.13, at 3. In 1611, Virginia required all citizens to attend church and observe the Sabbath, and enacted severe punishments for blasphemy, sacrilege, and criticism of the doctrine of the Trinity. *Id.* The law also required all citizens to embrace Anglican doctrine, and to pay for the maintenance of Anglican churches and ministers. *Id.,* at 3-4. Every clergyman was required to accept the Anglican Thirty-Nine Articles of Faith, and every church was required to follow the liturgy of the Church of England according to the Anglican Book of Common Prayer. *Id.* at 4.

These coercive practices, and anything like them involving coercion in regard to religion, are what the framers meant to prohibit in adopting the Establishment Clause, for this is what an Establishment of Religion meant at the time. They did not mean, however, to prohibit any voluntary, public, religious speech, or religious expression or symbolism, which do not involve any such coercion, as we will see further below.

The philosophy of the framers of our constitution was drawn heavily from highly influential British

philosopher John Locke, who recognized this distinction, writing,

> "The care of souls cannot belong to the civil magistrate, because his power consists only in outward force; but true and saving religion consists in the inward persuasion of the mind....Confiscation of estate, imprisonment, torments, nothing of that nature can have any such efficacy as to make men change the inward judgment that they have framed of things.
>
> "It may indeed be alleged that the magistrate may make use of arguments...and procure their salvation. I grant it; but this is common to him with other men. Every man has commission to admonish, exhort, convince another of error, and, by reasoning, to draw him into truth; but to give laws, receive obedience, and compel with the sword, belongs to none but the magistrate. And upon this ground, I affirm that the magistrate's power extends not to the establishing of any articles of faith, or forms of worship, by the force of his laws. For the laws are of no force at all without penalties, and penalties in this case are absolutely impertinent, because they are not proper to convince the mind."

Locke, *A Letter Concerning Toleration* (1684), in 5 *The Founder's Constitution* 52, 53 (P. Kurland and R. Lerner, eds. 1987)(hereinafter "Kurland").

St. George Tucker in *Blackstone's Commentaries* (1803) later recognized the same distinction between unjustifiable religious coercion and unobjectionable persuasion or expression or recognition of religion, saying that "religion, or the duty we owe to our creator, and the manner of discharging it, can be dictated only by reason and conviction, not by force or violence." Kurland, *supra,* p. 14, at 96. He continued,

> "In vain, therefore, may the civil magistrate interpose the authority of human laws, to prescribe that belief, or produce that conviction, which human reason rejects....The martyr at the stake, glories in his tortures, and proves that human law may punish, but cannot convince...."

Id. at 96. Tucker similarly added,

> "Statesmen should countenance [genuine religion] only by exhibiting, in their own example, a conscientious regard to it in those forms which are most agreeable to their own judgments, and by encouraging their fellow citizens to do the same."

Id. at 97.

This same distinction is found as well throughout the writings of Jefferson and Madison. In 1776, Jefferson led the adoption of Virginia's Declaration of Rights. The religious freedom clause in that Declaration stated,

> "That religion, or the duty we owe to our creator, and the manner of discharging it can be directed only by reason or conviction, *not by force or violence;* and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience...." (emphasis added).

Virginia Declaration of Rights, Section 16 (June 12, 1776), Va. Const. art. I, Sect. 16, in Kurland, *supra,* p. 14, at 70.

After adopting this provision in the state constitution, the Virginia Assembly repealed the prior laws originally adopted by the English Parliament compelling observance of and support for the established English church. But Jefferson insisted as well that the Assembly also repeal its own prior Acts that coerced conformity to the Christian religion by disqualifying dissenters from holding public office and imposing criminal penalties on them. In a famous passage, Jefferson said,

> "The error seems not sufficiently eradicated, that the operations of the mind, as well as the acts of the body, are subject to the coercion of the laws....The legitimate powers of government extend to such acts only as are injurious to others. *But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg....*Reason and free inquiry are the only effectual agents against error....It is error alone which needs the support of government. Truth can stand by itself.

> Subject opinion to coercion: Whom will you make your inquisitors? Fallible men; men governed by bad passions, by private as well as public reasons. And why subject it to coercion?...What has been the effect of coercion? To make one half the world fools, and the other half hypocrites....[W]e cannot effect [truth] by force. Reason and persuasion are the only practicable instruments."

Notes, in Kurland, *supra,* p. 14, at 79-80 (emphasis added).

In 1779, Jefferson drafted his "Act for Establishing Religious Freedom," which again focused on coercion as the problem, distinguishing speech and expression. The Act stated,

> "[No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or beliefs; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities."

Virginia Act for Establishing Religious Freedom, in Kurland, *supra,* p. 14 at 85. Indeed, the Preamble to the Act suggests that its principles are divinely inspired, saying,

> "Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy or meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do...."

Id., at 84. This Court has stated that this bill and the history of its ultimate enactment in 1786 by the Virginia General Assembly is "particularly relevant in the search for the First Amendment's meaning." *McGowan v. Maryland*, 366 U.S. 420, 437 (1961).

And from its earliest beginnings to this very day, our nation in practice has continued to recognize this distinction between religious coercion and mere expression. The Declaration of Independence appeals "to the Supreme Judge of the world" and to "the laws of nature and of nature's God," and proclaims that all men "are endowed by their creator with certain inalienable rights." In his first inaugural address, George Washington sought the blessings of God, "that Almighty Being" and "the Great Author of every private and public good." George Washington, First Inaugural Address, April 30, 1979, in *Inaugural Addresses of the Presidents of the United States from George Washington, 1789 to George Bush, 1989* at 1,2 (Bicentennial ed. 1989). Washington, in fact, said "it would be peculiarly improper to omit in [his] first official act [his] fervent supplications to that Almighty

Being who rules over the universe..." *Id.* Almost without exception, Washington's successors in office have included in their addresses statements of religious sentiment and supplications for God's assistance in discharging their official obligations.

The very next day after the House of Representatives of the First Congress voted to adopt the Establishment Clause, the House adopted a resolution requesting President Washington to proclaim "a day of public thanksgiving and prayer, to be observed by acknowledging the many and signal favors of Almighty God." *Lynch v. Donnelly,* 465 U.S. 668, 675, n.2 (1984). Washington responded by proclaiming November 26, 1789, as a day of thanksgiving in which to offer "our prayers and applications to the Great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions." *Id.* This tradition, too, has been continued throughout our history by virtually every President. *Id.*

It was the First Congress also that adopted the practice of opening daily sessions of the House and Senate with prayers by an official chaplain. *Marsh v. Chambers,* 463 U.S. 783, 787-788 (1983). Madison was a member of the House Committee that proposed the practice, and he voted in favor of it. *Id.* at 788 n.8. This practice has also continued to this very day.

Congress's early chaplains even conducted Sunday worship services in the hall of the House of Representatives, and both Jefferson and Madison attended these services while serving as President. 1

Stokes, *Church and State in the United States* 499-507.

Moreover, at least since Chief Justice John Marshall, the very sessions of the U.S. Supreme Court have been opened with a crier respectfully requesting "God Save the United States and this Honorable Court." *Engel v. Vitale,* 370 U.S. 421, 446 (1962) (Stewart, J., dissenting).

Our nation's leaders from the framers to this day engaged in these practices without any concern that they somehow violated the Establishment Clause because they did not involve any coercion, only expression. Those attending the inaugural ceremonies of our Presidents were not required to accept or support the religious sentiments those Presidents expressed. No one was required to give thanks and say prayers on days designated for that purpose by our Presidents, from Washington to Roosevelt to Reagan. No one was ever required to attend the chaplain's invocations opening sessions of Congress, nor to accept or support the religious beliefs expressed by the chaplain.

For all of the foregoing reasons, we urge this Court to adopt a new standard evaluating alleged Establishment Clause violations based on whether the challenged policy, practice, or action involves coercion in regard to religion. It is long past time to establish a principled foundation for Establishment Clause law rooted in the Constitutional text and our nation's history and cultural heritage.

B. The Coercion Standard Is Practical and Workable

The coercion standard for Establishment Clause violations would not be a wooden, inflexible, mechanistic rule of law. Whether coercion exists in a particular circumstance would depend on the facts of each case as well. For example, the coercion standard would not require any change in decisions regarding school pra[illegible] in elementary school or secondary schools. The youth of the students and the social pressures involved easily satisfy a flexible and realistic vision of coercion, leaving students feeling compelled to participate in an effective religious ceremony contrary to their will.

But outside of school prayer, the coercion standard would likely result in a finding of no establishment in almost all other cases involving mere expression rather than coercion. For example, a newly elected President saying a prayer in his Inaugural address would not involve coercion, nor would a Presidential Proclamation of a Day of Thanksgiving and Prayer, nor would the chaplains praying at the start of each Congressional day, where adults obviously from many backgrounds are free to accept or reject what they hear, or forego attendance at any prayer altogether. Mere speech or expression by itself does not involve coercion, precisely for these reasons. In Jefferson's terms, the practice in these cases "neither picks my pocket nor breaks my leg."

The same would be true in cases involving mere symbolism, recognition of traditions, or other, similar

expression, such as Christmas holiday displays, or monuments or paintings referencing religious subjects such as the Ten Commandments, or Moses receiving the law from God. No longer would mere cross cases from all over the country have to come before this Court, or even the federal courts at all. Of course, the facts of a particular case can still raise the issue of coercion.

Moreover, taxation forcing contribution for a program targeted specifically to aid religion would be unconstitutional, just as the framers strongly objected to taxation specifically to aid religion in their time. Such programs are too similar to the mandatory financial support to established churches under the establishment of religion practices the framers intended to ban.

But allowing churches to participate in general secular programs on the same terms as everyone else would not be prohibited. For example, a voucher program aiding all schools, public and private, religious or non-religious, that allowed religious schools to participate on the same terms and conditions as everyone else, would not involve an unconstitutional establishment of religion. Such a program would involve compelling aid to education, not religion. Indeed, excluding some schools because of their religion would raise a coercion issue, analogous to the historical establishment practice of denying access to government benefits based on religious views.

II. THE VOLUNTARY, ROTATING, INVOCATIONS OFFERED BY CITIZENS OF THE TOWN OF GREECE TO SOLEMNIZE OPENINGS OF TOWN BOARD MEETINGS ARE NOT AN ESTABLISHMENT OF RELIGION BECAUSE THEY DO NOT INVOLVE COERCION.

With a clear, simple standard rooted in the text of the Constitution and its surrounding history, this case is easily resolved. The voluntary, rotating, legislative prayers offered by citizens of the Town of Greece to solemnize openings of Town Board meetings do not involve an unconstitutional establishment of religion because they do not involve coercion of any sort. They do not involve anything like the coercive historic practices of religious establishments known by the Founders, as discussed above, which is what they were prohibiting with the term "Establishment of Religion."

Those hearing the prayers remain free to interpret, accept, or reject their meaning as they each choose. No one is forced or coerced to accept or reject or believe or do anything. They can take the prayers as an expression of solemnity and seriousness for the meeting about to take place. They can take the prayers as an expression of respect for the religious heritage of the nation, regardless of the diverging religious opinions of those hearing the prayers. They can take the prayers as an expression of some religious message, which they are perfectly free to accept or reject. However those hearing each prayer interpret or understand it, the prayers are in any event just expression, which inherently does not involve coercion of any sort. In Jefferson's illuminating words, again,

the prayers "neither pick[] my pocket nor break[] my leg."

In our daily lives, we often see or hear the expression of messages with which we disagree, sometimes strongly, or otherwise find objectionable or inappropriate. The national political conventions of the two major parties are broadcast on the networks, with something surely to offend everyone. But without coercion, the Establishment Clause does not provide a foundation for the courts to prohibit any speech, expression, or symbolism. The public still has democratic control over national and state leaders, and can exercise its will over the messages, expression, or symbolism included in national or state memorials through that means. But there is nothing in the Constitution to limit such mere expression.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

—v.—

SUSAN GALLOWAY and LINDA STEPHENS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN JEWISH COMMITTEE AND JEWISH COUNCIL FOR PUBLIC AFFAIRS IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI*[1]

The American Jewish Committee ("AJC"), established in 1906 by a small group of American Jews deeply concerned about pogroms aimed at Russian Jews, is dedicated to the defense of religious rights and freedoms of all Americans. In the decades since its founding the AJC has collaborated with other minority groups in shared strivings to realize fully the constitutional guaranties of protection for conscience and liberty. Some AJC members are religiously observant and some are not, some pray and some do not, and AJC's membership – like the United States population at large – reflects a diverse and wide range of beliefs about God. As a group, AJC is committed to the idea that government should not involve itself in sponsoring, encouraging, or discouraging religious observances or practices, including prayer. AJC believes that our Constitution wisely leaves decisions concerning matters of individual conscience and belief, such as whether and when to pray, exclusively to individuals and the private religious community. In support of these principles, AJC through the years has filed numerous briefs in this Court on important matters of religious freedom.

[1] Pursuant to Rule 37.3 of the Rules of the Supreme Court (the "Rules"), all parties have consented to the filing of this brief by filing blanket consent letters with the Clerk. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored the brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. In addition, no persons or entities other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

The Jewish Council for Public Affairs ("JCPA") is the coordinating body of fifteen national and 125 local Jewish community relations organizations. JCPA was founded in 1944 by the Jewish Federation system to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a pluralistic society. The JCPA recognizes that the Jewish community has a direct stake – along with an ethical imperative – in assuring that America remains a country wedded to the Bill of Rights and that the wall of separation between church and state remains an essential bulwark for religious freedom in the United States. The JCPA believes that religious institutions and people of faith can and should play a vital role in public discourse. At the same time, the pluralistic fabric of our society demands that individuals, especially those acting in an official public capacity, should never impose personal religious views on others and that government bodies should operate without preferential treatment for any one religious perspective.

The AJC and JCPA submit this brief principally to oppose the argument of Petitioner and many of its *amici* that this Court should supplant current Establishment Clause doctrine with some form of a coercion or proselytization test, and to urge the Court instead to preserve the deeply rooted Establishment Clause understanding of neutrality that reaches beyond non-coercion and non-proselytization to protect against government programs that have the purpose or effect of advancing or inhibiting religion.[2]

[2] The AJC and JCPA have long opposed the recurring arguments made to this Court that it should reduce the protection of the Establishment Clause to some version of a

SUMMARY OF ARGUMENT

Petitioner and many of its *amici* take aim at the Court's "endorsement test" and the three-part *Lemon* test. But in fact their agenda is far more ambitious. Petitioner argues that "*Lemon* and its endorsement-test offspring should be replaced" (Brief of Petitioner ("Pet. Br.") at 50) with a test that asks only (a) if citizens are being "coerced" into "religious participation" or to "adopt a particular tenet or belief" (*id.* at 48, 39), or (b) whether the challenged practice or expression is being "exploited" to "advance or proselytize on behalf of one religion to the exclusion or detriment of others." *Id.* at 38. Petitioner's *amici* propose an even narrower reading of the Establishment Clause that would supplant current law with a single question: whether "the challenged policy, practice or action involves coercion in regard to religion" (Brief for American Civil Rights Union as *Amicus Curiae* Supporting Petitioner at 5) or "actual legal coercion" (Brief for Virginia Christian Alliance, *et al.* as *Amici Curiae* Supporting Petitioner at 19-20). Or as one *amicus* proposes, "[if] the power of the government is not used coercively to compel *adherence* to a particular belief or support of a particular church, there is no establishment." (Brief for Center for Constitutional Jurisprudence as *Amicus Curiae* Supporting Petitioner at 18) (emphasis added).

We most respectfully urge the Court to decline these numerous invitations to radically

narrow "no coercion" rule. More than twenty years ago, AJC and JCPA joined with a number of other religious and secular organizations in filing an *amicus* brief opposing such arguments in *Lee v. Weisman*, 505 U.S. 577 (1992).

redraw the boundaries of church/state relations. What Petitioner and its *amici* are suggesting – that this Court adopt some version of a narrow coercion test as the only limit on establishment – would require a wholesale rewriting of sixty-six years of the Court's Establishment Clause jurisprudence, beginning with *Everson v. Board of Education*, 330 U.S. 1 (1947). It would eliminate any consideration of the purposes or effects of government programs relating to religious messages or religious activity. It would open the floodgates to re-litigation of a number of long-settled questions, including as just one example whether the Establishment Clause stands as a barrier to various forms of allegedly "voluntary" government-sponsored prayer in public school classrooms. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38 (1985); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). And because coercion (like effect and endorsement) is not a self-defining term – and Petitioner and its *amici*, like members of this Court, have disagreed over the form it must take – its adoption as the exclusive test of establishment would not eliminate the "delicate and fact-sensitive" review that has been the hallmark of this Court's Establishment Clause decisions. *Lee v. Weisman*, 505 U.S. 577, 597 (1992).

The proposition that coercion is a sufficient *but not a necessary* predicate for an Establishment Clause violation – that it represents the floor, not the ceiling, of the Establishment Clause's protective ambit – is deeply embedded in the Court's precedents. The Court has struck down numerous government-sponsored programs relating to religion and religious exercises without

finding any actual coercion, and for fifty years has been on record rejecting the argument that coercion should be installed as the *sin qua non* of an Establishment Clause violation. *See, e.g., County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 597 n.47 (1989) ("[The Court] repeatedly has stated that 'proof of coercion' is 'not a necessary element' of any claim under the Establishment Clause."); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 786 (1973) ("The absence of any element of coercion . . . is irrelevant to questions arising under the Establishment Clause."); *Schempp*, 374 U.S. at 223 ("[A] violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.").

That so few Establishment Clause cases involving actual coercion have come to this Court shows a broad consensus understanding – emphasized by the Court in recent decisions – that at a "minimum" the Establishment Clause took coercion with respect to religion off the table of acceptable government conduct. Virtually all Establishment Clause cases decided by this Court have turned instead on a different question – beyond coercion, what else, what more, does the Establishment Clause forbid? In this way, the broad history of Establishment Clause litigation reinforces the understanding that the core and disputed Establishment Clause question is not whether the anti-establishment rule reaches beyond non-coercion but rather how much further it goes.

Diverse majorities of this Court accordingly have used coercion as only one marker for

assessing such constitutional challenges, alongside other long-established and recently reaffirmed "signposts," including the requirements of government neutrality, that the government not act with "the purpose of advancing religion," and that state-sponsored programs or activities have "a primary effect that neither advances nor inhibits religion." *See, e.g., McCreary County v. American Civil Liberties Union*, 545 U.S. 844, 874, 881 (2005) (reaffirming the "importance of neutrality as an interpretive guide" and asking whether county's Ten Commandments policy has a "predominantly religious purpose"); *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (asking whether Ohio's school voucher program "has the forbidden 'effect' of advancing or inhibiting religion"); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305-08, 312-13 (2000) (assessing whether policy permitting student-led prayer before high school football games "encourages" or "endorses" or "sponsors" a religious activity and also whether it had "the improper effect of coercing").

As for a non-proselytization test, Petitioner and its many *amici* are at odds with themselves. They universally condemn any outcome that would have courts or local elected officials "entangle" themselves in attempting to distinguish "sectarian" from "nonsectarian" prayer. *See, e.g.*, Brief for United States Senators Marco Rubio, *et. al.* as *Amici Curiae* Supporting Petitioner at 22-33. At the same time, they propose an alternative test that would require a similar if not more scrutinizing parsing of those same prayers to discern from the words or presentations any forbidden motivation or *subjective* intent to proselytize. Any such subjective

test is impractical and easily circumvented. It leaves unanswered whose illicit motives matter. Is it the government body that passed the challenged program, local officials who are implementing it, or the clergy or other prayer-givers who may be involved in selecting the religious messengers and delivering the challenged messages? And how will such improper motive or forbidden intent be proven – depositions, or even trials, on the question of whether a particular prayer-giver was selected to deliver, or in fact delivered, a prayer with the prohibited intention of seeking to convert audience members? Instead, to the extent *Marsh v. Chambers*, 463 U.S. 783 (1983), requires inquiry as to proselytization or exploitation of prayer programs, the inquiry should be an objective one only.

That this Court "has found no single mechanical formula that can accurately draw the constitutional line in every case," (*Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring)), is neither grounds for despair nor justification for a purported quick-fix that would be inconsistent with both the broad religious neutrality required by the Establishment Clause and nearly seven decades of the Court's "delicate and fact-sensitive" Establishment Clause case law. *Lee*, 505 U.S. at 597. The Court should not boil down the broad protections against establishment to an exclusive, narrow, and permissive test that would stand in the way of only the most obvious and extreme instances of coercion or intentional proselytization.

We also fully agree with Respondents that the Town of Greece's legislative prayer program amounts to an unconstitutional establishment

of religion, whether the test is coercion, proselytization, exploitation or endorsement. We accordingly join in urging affirmance of the Second Circuit's decision below.

ARGUMENT

I. The Court Should Not Overturn Fifty Years of Precedent By Holding Coercion To Be A Prerequisite To An Establishment Clause Violation

We begin with the observation that the object of the attacks that fill so many pages of the briefing from Petitioner and its *amici* – the three-part *Lemon* test – was adopted by a 6-1 vote (7-1 with Justice Brennan's concurrence) and summarized "the cumulative criteria developed by the Court over many years." *Lemon*, 403 U.S. at 612. The first two parts – purpose and primary effect – came directly from the 8-1 decision in *Schempp*, 374 U.S. at 222. The third part came from *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970).

The *Schempp-Lemon* formulation was an elaboration of the foundational Establishment Clause principle that government must be neutral with respect to religion. *See Lemon*, 403 U.S. at 612. The Court stated that enduring rule in its first modern Establishment Clause decision: the First Amendment "requires the state to be neutral in its relations with groups of religious believers and nonbelievers." *Everson*, 330 U.S. at 18.

Petitioner says that "*Lemon* and its endorsement-test offspring should be replaced."

Pet. Br. at 50. But in urging their replacement with some form of a coercion test, Petitioner and its *amici* challenge the whole history of Establishment Clause jurisprudence in this Court and would eliminate any consideration of purpose or effect. It is true that many early opinions of this Court discuss the evil of coercing persons to participate in religious observances, and that certain more recent cases have been decided by applying the consensus understanding that "at a minimum" the Establishment Clause forbids such government coercion. This is because coercion is the clearest example of establishment, and where it is found there is no need for the Court to explore the boundaries of the Establishment Clause any further. But this Court rejected proof of coercion as *necessary* to prove an Establishment Clause violation at its first opportunity. Since then it has never held – and repeatedly has refused invitations that it hold – that the government *only* runs afoul of the Establishment Clause if it engages in religious coercion.

To appreciate just how far Petitioner and its *amici* are asking this Court to depart from its settled precedent, it is instructive to look back to the Court's earliest Establishment Clause opinions. Those decisions drew no distinction between coercion on the one hand and aid, persuasion, promotion, sponsorship, influence, approval, or encouragement on the other hand, condemning the former and permitting the latter. Rather, a wide range of non-coercive conduct by which the government put its thumb on the scale in favor of religion was understood and described as plainly unconstitutional.

Justice Black wrote for the majority in *Everson*:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion.*

Everson, 330 U.S. at 15 (emphasis added). This passage treats force and influence in matters of religion as equally objectionable. The Court certainly did not suppose that the government could "set up a church" if no one were coerced to support it.

Justice Rutledge for the four dissenters in *Everson* was even more explicit about non-coercive violations of the Establishment Clause. He listed coercive violations of the Establishment Clause, and he contrasted these with "the serious surviving threat[s]" of financial aid to religious institutions and "efforts to inject religious training or exercises and sectarian issues into the public schools." *Id.* at 44 (Rutledge, J., dissenting). Thus, none of the nine Justices in *Everson* believed that coercion was an element of every Establishment Clause violation.

In *Zorach v. Clausen*, 343 U.S. 306 (1952), the Court upheld programs under which public schools released students to attend off-premises private religious instruction. The Court distinguished the released time program in *Zorach*

from the similar program struck down in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), on grounds that had nothing to do with coercion. The charge of coercion in both cases rested on the claim that limiting students to either study hall or religious instruction coerced them to choose religious instruction. *Zorach*, 343 U.S. at 309-10. *Zorach* rejected that claim, finding neither coercion nor persuasion. *Id.* at 311. The Court distinguished the two cases instead on the ground that religious instruction was off campus in *Zorach*, but on campus in *McCollum*. *Id.* at 309. The key to an Establishment Clause violation was not coercion, but use of school property to "assist[]" and "aid," *McCollum*, 333 U.S. at 210, and "promote," *Zorach*, 343 U.S. at 315, programs of religious instruction. Allowing students to leave campus for such instruction, on the other hand, was viewed as "no more than accommodat[ing]" the private choices of religious families. *Id.*

Building on these precedents, the Court broke no new ground when it emphatically rejected a coercion test in the first school prayer case, *Engel v. Vitale*, 370 U.S. at 430-31. The Court said that the Establishment Clause went far beyond even indirect coercion:

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. *But the purposes*

> *underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.*

Id. at 431 (emphasis added).

Other language in the opinion confirms the strength of the Court's belief that coercion is not an essential part of Establishment Clause analysis. It did not matter that no pupil was "required" to recite the prayer or that New York's prayer program "permit[ted] those who wish[ed] to do so to remain silent or be excused from the room." *Id.* at 430. It was unconstitutional for state actors "to *encourage* recitation of the Regents' prayer," *id.* at 424, to place "its *official stamp of approval*" on any religion, *id.* at 429, or to use its "prestige" to "*support or influence* the kinds of prayer the American people can say," *id.* (all emphases added).

Justice Douglas, concurring, similarly highlighted that there was "no element of compulsion or coercion," as the statute provided that school children could be excused or remain silent and no comment or penalty was to follow, *id.* at 438, and that the prayer at issue was "of a character that does not involve any element of proselytizing." *Id.* at 439. Yet he too found the prayer program to violate the Establishment Clause, as an unconstitutional financing by government of a "religious exercise." *Id.* at 442.

The Court reaffirmed its commitment to an interpretation of the Establishment Clause that went well beyond coercion in the second

school prayer case, *Schempp*, 374 U.S. 203. The Court said that the purpose of the First Amendment was "to take every form of *propagation of religion* out of the realm of things which could directly or indirectly be made public business." *Id.* at 216 (quoting *Everson*, 330 U.S. at 26 (Jackson, J., dissenting) (emphasis added)). And the state cannot "*perform or aid in performing* the religious function." *Id.* at 219 (quoting *Everson*, 330 U.S. at 52 (Rutledge, J., dissenting) (emphasis added)).

The Court quoted the entirety of *Engel*'s holding that coercion is not an element of an Establishment Clause violation, *Schempp*, 374 U.S. at 221, and then repeated the point more succinctly, *id.* at 223 ("[A] violation of the Free Exercise clause is predicated on coercion while the Establishment Clause violation need not be so attended."). Accordingly, it was of no constitutional significance that the program requiring the daily reading in public schools from the Holy Bible was "voluntary" in so far as it provided that any child could be excused or decline to participate in the exercises. *Id.* at 207, 211-12, 224-25. Elaborating on "the wholesome 'neutrality' of which this Court's cases speak," the Court formulated what became the first two parts of the *Lemon* test: "there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 222 (citation omitted).

Justice Stewart in dissent argued at length that the constitutional challenge should "turn[] on the question of coercion," *id.* at 316-20, so the issue was squarely presented. His view was not joined by any of his fellow Justices.

Still, his sensitive understanding of coercion makes clear that he would not define coercion as narrowly as Petitioner and its *amici*. Foreshadowing the kind of "subtle" and "indirect" pressure that this Court would come to recognize as coercive in later decisions, *see Lee*, 505 U.S. 577, and *Santa Fe Indep. School Dist.*, 530 U.S. 290 (discussed below), Justice Stewart was careful to acknowledge the dangers of "psychological compulsion to participate." *Schempp*, 374 U.S. at 318. He thought it would be coercive if students who failed to attend religious exercises had to forego "morning announcements" or if the "excusal provision was so administered as to carry any overtones of social inferiority." *Id.* at 320 n.8. All nine Justices in *Schempp* thus rejected the type of narrow and limited coercion test advanced by Petitioner. *See, e.g.*, Pet. Br. at 39 ("[c]oercion occurs when an individual is *required* to adopt a particular tenet or belief" (emphasis in original)); *id.* ("[A]n individual is not coerced . . . so long as that individual is not required to participate [in a civic acknowledgement of religion] or assent to the views expressed.").

A decade later, the argument that coercion is "a necessary element of any claim under the Establishment Clause" was again raised, and again squarely rejected, this time by a six-Justice majority. *Nyquist*, 413 U.S. at 786 ("The absence of any element of coercion . . . is irrelevant to questions arising under the Establishment Clause.").

In *Stone v. Graham*, 449 U.S. 39 (1980), the Court reviewed a Kentucky statute requiring the posting of the Ten Commandments, pur-

chased with voluntary contributions, on the walls of schoolrooms. If coercion had been a requirement to prove the Establishment Clause violation, the lower court decision upholding the statute surely would have been affirmed. The dissent emphasized that there "was no compelled reading." *Id.* at 45 n.1 (Rehnquist, CJ.). But this Court invalidated the Kentucky practice, citing state "auspices" and "official support" for religion as unconstitutional. *Id.* at 42 (quoting *Schempp*, 374 U.S. at 222).

Two years later, the Court unanimously invalidated a law that authorized students and teachers to volunteer to lead the class in prayer. *Karen B. v. Treen*, 653 F.2d 897, 899 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982). The statute stated that "no student or teacher could be compelled to pray," but that did not solve the establishment problem or even require full argument. *Id.*

The following term the Court decided *Marsh*, 463 U.S. 783. Prayer in the Nebraska legislature was upheld in a narrow opinion by Chief Justice Burger, focusing on the "unique history" of legislative prayer. *Id.* at 791. In the same term, another opinion by Chief Justice Burger quoted and reaffirmed the *Schempp-Lemon* test, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982), and condemned a "symbolic benefit" to religion. *Id.* at 125. Eight justices joined this opinion.

The next year, the Court unanimously affirmed invalidation of a statute authorizing public school teachers to lead willing students in prayer. *Jaffree v. Wallace*, 705 F.2d 1526, 1535-36 (11th Cir. 1983), *aff'd in part*, 466 U.S. 924 (1984). And all nine Justices applied the

Schempp-Lemon test to the municipal Christmas display in *Lynch v. Donnelly*, 465 U.S. 668 (1984), although they disagreed on what the outcome should be.

In a concurring opinion in *Lynch*, Justice O'Connor for the first time set out her endorsement test to clarify the first two prongs of the *Lemon* test. *Lynch*, 465 U.S. at 690. The following year, in *Wallace*, 472 U.S. 38, the Court again struck down a so-called "voluntary" prayer provision for public schools. The Court quoted and applied the *Schempp-Lemon* test, but also incorporated Justice O'Connor's endorsement test as an authoritative interpretation:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.

Id. at 56 n.42 (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)).

Two years later, in *Edwards v. Aguillard*, 482 U.S. 578 (1987), the Court again applied the *Schempp-Lemon* test, *id.* at 582-83, as clarified by the endorsement test, *id.* at 585, to strike down a statute requiring balanced treatment of evolution and "creation science." It followed that same analysis – *Schempp-Lemon* and the endorsement test – to prohibit display of a crèche in a county courthouse in *County of Allegheny*, 492 U.S. at 592. The *County of Allegheny* Court did not say

that the display was coercive; rather, it said that the display "has the effect of endorsing a patently Christian message." *Id.* at 601.

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principal remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief . . . .

Id. at 593-94.

Justice Kennedy's *County of Allegheny* dissent suggested a fundamentally different standard: that "government may not coerce anyone to support or participate in any religion or its exercise," *id.* at 659, and that government may not "proselytize on behalf of a particular religion," *id.* at 661.

The majority declined to adopt this test, recalling that the Court "repeatedly has stated that 'proof of coercion' is 'not a necessary element of any claim under the Establishment Clause'." *Id.* at 597 n.47. It also noted that Justice Kennedy's proposed proselytization test was "no less fact intensive than the 'endorsement' formulation." *Id.* at 606-608.

Justice O'Connor, concurring, underscored the differences between the Court's settled framework and Justice Kennedy's proposed alternative:

> An Establishment Clause standard that prohibits only 'coercive' practices or overt efforts at government proselytization, . . . but fails to take

> account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic community. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis.

Id. at 627-628. Justice O'Connor also pointed out the logical fallacy of equating the Establishment Clause with a no coercion rule. *Id.* at 628 ("To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise clause a redundancy."). *See also* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. Chi. L. Rev. 195, 205 (1992) ("[T]he Establishment Clause cannot be mere surplusage. If the Free Exercise Clause standing alone guarantees free exercise of non-religion, the Establishment Clause must do more than bar coercion of non-believers. Thus a 'coercion' test for establishment would reduce the Establishment Clause to a redundancy.").

Three years after *County of Allegheny*, in *Lee*, 505 U.S. 577, this Court again declined the urgings that it discard *Lemon*. *Id.* at 587. "[A]t a minimum," Justice Kennedy wrote for the six-member majority, "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Id.* at

587 (citation omitted). This constitutional floor of no coercion was enough to invalidate a government policy that invited clergy to deliver prayers at secondary public school graduation ceremonies. The Establishment Clause injury was "that the State, in a school setting, *in effect* required participation in a religious exercise." *Id.* at 594 (emphasis added). One "timeless lesson of the First Amendment," the Court observed, was that citizens were not to be "subjected to state-sponsored religious exercises." *Id.* at 592. Accordingly, neither the fact that the prayers were said to be "nonsectarian" nor the stipulation that attendance at graduation was "voluntary" could save the program from a finding of unconstitutionality. It was struck down because objecting graduates were "induced to conform" through "subtle and indirect" pressure that "can be as real as any overt compulsion." *Id.* at 594-95, 599, 593.

Four Justices wrote or joined two separate concurring opinions in *Lee* to "make clear that proof of government coercion is not necessary to prove an Establishment Clause violation," although "it is sufficient." *Id.* at 604 (Blackmun, J., concurring).

> Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.
>
> But it is not enough that the government restrain from compelling religious practices: it must not engage in them either. *The Court repeatedly has recognized that a violation of the Estab-*

> *lishment Clause is not predicated on coercion.*

Id. (emphasis added). *See also id.* at 618 (Souter, J., concurring) (noting that adopting "a 'coercion' analysis of the [Establishment] Clause" would require "abandoning our settled law").

In *Santa Fe Independent School Dist.*, 530 U.S. 290, a six-member majority of this Court reaffirmed that while "at a minimum" the Establishment Clause bars coercion, *id.* at 302 (quoting *Lee*, 505 U.S. at 587), the Court's Establishment Clause jurisprudence continues to be guided by the three *Lemon* factors, including the endorsement test. *Id.* at 308, 314.

> In cases involving state participation in religious activity, one of the relevant questions is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools."

Id. at 308 (citation omitted). The three dissenting Justices acknowledged that the majority had applied – and thus reaffirmed – the *Lemon* test. *Id.* at 319 & n.1 (Scalia, J., dissenting).

Applying these multiple tests, and strongly reaffirming that the Establishment Clause protects against more than just actual coercion, the Court in *Santa Fe* invalidated a government policy permitting (but not requiring) student-led, student-initiated prayer at public high school football games. The policy

was struck down because it "involve[d] both perceived and actual endorsement of religion," *id.* at 305; constituted state "sponsorship of a religious message," *id.* at 309-10, 313; had the improper "effect of coercing those present to participate in an act of religious worship," *id.* at 312; and had the "purpose and create[d] the perception of encouraging the delivery of prayer," *id.* at 317.

The same *Schempp-Lemon* framework was reaffirmed again two years later, as the Court upheld Cleveland's school voucher program. *Zelman*, 536 U.S. at 640 (asking whether Ohio's school voucher program "has the forbidden 'effect' of advancing or inhibiting religion"). The Court made clear that if the program had been "skewed" toward religion, the outcome would have been different. *Id.* at 653. *Zelman* drew upon a long line of decisions involving state aid to religion that also had followed the *Schempp-Lemon* framework. *See, e.g.*, *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 485 (1986) ("We are guided . . . by the three-part test set out by this Court in *Lemon* . . . ."); *Mueller v. Allen*, 463 U.S. 388, 394 (1983) ("The general nature of our inquiry in this area has been guided, since the decision in *Lemon* . . . by the 'three-part' test laid down in that case . . . ."). *See also Agostini v. Felton*, 521 U.S. 203, 222-23 (1997) ("[W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged.").

In a pair of cases announced on the same day in 2005, *McCreary County*, 545 U.S. 844, and *Van Orden*, 545 U.S. 677, the Court split over the

constitutionality of public displays of the Ten Commandments. Displays were prevented in courthouses in Kentucky, *McCreary*, 545 U.S. at 870, and permitted on the grounds of the Texas State Capitol, *Van Orden*, 545 U.S. at 681.

Only one of the two decisions – *McCreary* – yielded a majority opinion. The Court again declined the invitation to abandon *Lemon* – this time, its purpose prong. *McCreary*, 545 U.S. at 861-64. It reaffirmed "[t]he importance of neutrality as an interpretive guide," harkening back to *Everson* in 1947, *id.* at 874-76; discussed and applied the reasonable observer test, *id.* at 866; and concluded that under the first *Lemon* prong – and without any finding of coercion – the counties' courthouse displays presented an impermissible predominantly sectarian purpose. *Id.* at 859-70.

In *Van Orden*, the display in the state capitol was upheld through the combination of a four-Justice plurality and Justice Breyer's concurrence. The plurality found the *Lemon* test "not useful" and relied instead on "the nature of the monument and . . . our Nation's history." *Van Orden*, 545 U.S. at 686. Along the way it reaffirmed that Governmental "institutions must not press religious observances upon their citizens." *Id.* at 683 (Rehnquist, C.J., plurality opinion).

Justice Breyer was of the view that the Court's "prior tests provide useful guideposts." *Id.* at 700. But he saw "no test-related substitute for the exercise of legal judgment," *id.* at 700, and relied more on "consideration of the basic purposes of the First Amendment's Religion Clauses themselves," *id.* at 704.

The Court's most recent Establishment

Clause decision – *Salazar v. Buono*, 559 U.S. 700 (2010) – resulted in no majority opinion. Justice Kennedy's controlling plurality opinion remanded the case and raised – but did not answer – the question of whether the endorsement test's "'reasonable observer' standard continued to be the appropriate framework through which to consider the Establishment Clause" challenge. *Id.* at 720.

A review of this Court's modern Establishment Clause jurisprudence thus yields a few important conclusions. The proposition that a showing of coercion is *not* a prerequisite to demonstrating an Establishment Clause violation has been the settled and binding law for more than fifty years, since the issue was raised and unequivocally decided in *Engel* and *Schempp*. It was expressly reaffirmed twice since then, in *Nyquist* and then in *County of Allegheny*. The *Schempp-Lemon* test – and in particular the proposition that government action that has the purpose or effect of advancing or inhibiting religion violates the Establishment Clause – also has been the settled law of this Court for fifty years. That framework has been applied to overturn, or at least considered in overturning, numerous government practices and programs, including those in two of the Court's most recent Establishment Clause majority opinions, *Santa Fe* and *McCreary*. Discarding and overturning all of this precedent in favor of some version of the proposed non-coercion/non-proselytization tests would require a wholesale rewriting of the Court's deeply rooted interpretation of the Establishment Clause. To do so would eliminate any consideration of improper

sectarian purpose or effect and would re-open for litigation some of the most divisive practices that this Court has consistently condemned, including the many variations of so-called voluntary prayer in school. It would not change the fact that whatever the test – effect, endorsement, coercion, exploitation, or proselytization – its definition and application will not be easy or noncontroversial and will require the same kind of fact-intensive and sometimes difficult line-drawing that has long been a part of this Court's decisions in this area. For all of these reasons, we urge the Court to adhere to its precedents and decline to adopt coercion (or coercion plus proselytization) as the only Establishment Clause limitation on state involvement with religion.

II The Court Should Reject Any Proselytization Test That Would Require A Finding of Subjective Intent

Beyond a coercion test, Petitioner puts forth a subjective intent to proselytize test as an additional "limitation on government action." Pet Br. at 38-39. Certain of Petitioner's *amici* similarly urge the Court to hold that sectarian legislative prayer is permissible "in the absence of findings of improper governmental motivation, or intentional government exploitation, proselytization or disparagement of one faith over another" (Brief for The Rutherford Institute as *Amicus Curiae* Supporting Petitioner at 16) and propose that the inquiry should look to "the intent of the government speaker" (Brief for Board of Commissioners for Carroll County,

Maryland, *et. al.* as *Amici Curiae* Supporting Petitioner at 32-33) or "for evidence of an 'impermissible motive' or exploitation to proselytize" (Brief for Members of Congress as *Amici Curiae* Supporting Petitioner at 35).

To the extent *Marsh* requires inquiry into whether a prayer program or other religious expression is being used to proselytize or exploited to advance religion, the test should instead be an *objective* one, including and reflecting a realistic assessment of the *effect* that religious messages have on reasonable citizens. *See County of Allegheny*, 492 U.S. at 661 (Kennedy, J., dissenting) (the Establishment Clause "forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion"). The proposals of Petitioner and its *amici*, on the other hand, raise more questions than they answer by requiring close scrutiny of the subjective motivations of legislators, local officials, and even clergy.

Petitioner (and its *amici* supporters) harshly criticizes – and to varying degrees maintains that this Court has prohibited – any test that would require courts or local officials to attempt to "superintend[] the content of prayers to ensure that they are nonsectarian." (Pet. Br. at 41-42 (citing *Lee*, 505 U.S. at 588-89)). But nowhere do they answer the obvious question that their own criticisms raise: How are the courts or local officials to apply the test they suggest – i.e., whether prayers are subjectively "intended to proselytize" – without engaging

in a similar scrutiny of the content of what is said? While we agree with the Second Circuit that the lower courts may, and often must, consider "the substance of the prayers under challenge," (Pet. App. at 21a n.6; *see also Joyner v. Forsyth County*, 653 F.3d 341, 351 (4th Cir. 2011) ("It is to say the least an odd view of the judicial function that denies courts the right to review the practice at issue."), our point is that Petitioner and its *amici* cannot have it both ways. Whatever the challenges presented in separating the sectarian from the nonsectarian in state-sponsored prayers (and we agree with Respondents that it is a manageable task), it often will be even more challenging to discern from the text of a prayer whether the author's subjective intention is to convert others to or advance a particular religious faith, or simply to acknowledge or discuss that faith. Not surprisingly, in deciding challenges to prayer practices that raise issues of prohibited proselytization, the lower courts, like local officials, have in fact, and necessarily, looked to the content of the prayer at issue. *See, e.g., Newdow v. Roberts*, 603 F.3d 1002, 1021 (D.C. Cir. 2010) (reviewing content of Presidential Inaugural prayers to assess whether they were being "exploited to proselytize"); *Pelphrey v. Cobb County*, 547 F.3d 1263, 1277-78 (11th Cir. 2008) (reviewing "diversity of religious expressions," as well as their duration and placement, in affirming finding of no exploitation to advance one faith); *Cole v. Oroville Union High School Dist.*, 228 F.3d 1092, 1096-1097 (9th Cir. 2000) (explaining the proselytizing nature of the proposed student prayer by quoting phrases and

words from the prayer itself); *Snyder v. Murray City*, 159 F.3d 1227, 1235 (10th Cir. 1998) (same).

Petitioner and its *amici* are also unclear on whose intent or motivation or exploitation matters, and how it could ever be practically proven. Are the courts to focus on the legislators who enacted the prayer program? Local government officials who carry it out? The clergy or prayer-givers themselves? All three? Each raises its own difficulties. And the various briefs by Petitioner and its *amici* make clear that even they cannot agree on whose intent matters. *See, e.g.*, Brief for The United States as *Amicus Curiae* Supporting Petitioner at 17 n.6 ("Contrary to Petitioner's suggestion (*see, e.g.*, Pet. Br. 21-22, 44), *Marsh*'s prohibition on the exploitation of an opportunity for prayer to proselytize or advance one faith, or to disparage another, applies both to the government entity providing the opportunity and to the prayer-givers accepting the opportunity, whether employed by the government or not.").

As Justice Scalia has observed, "assessing the subjective intent of governmental decision-makers" is a "perilous enterprise" involving "many hazards," and "discerning the[ir] subjective motivation . . . is . . . almost always an impossible task." *Edwards*, 482 U.S. at 636-639 (dissenting opinion). Evidence of intent may be sparse or non-existent; post-litigation denials of improper motivation are easily stated but not so easily contested; and these and other sources of evidence of intent "are eminently manipulable." *Id.* These are some of the reasons why "Establishment Clause analysis does not look to the veiled psyche of gov-

ernment officers." *McCreary*, 545 U.S. at 863.

There are other problems. Different prayer givers may be invited by different legislators or a particular local official, each with his or her own motivations, presenting the question of whether one individual's improper motivations may fairly be ascribed to a government body as a whole. *See Edwards*, 482 U.S. at 636-639 (Scalia, J., dissenting); *see also Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 508 U.S. 520, 558-59 (1993) (Scalia, J., concurring) (noting that "it is virtually impossible to determine the singular 'motive' of a collective legislative body" and that the First Amendment "does not put us in the business of invalidating laws by reason of the evil motives of their authors"). Legislators may enjoy the protection of legislative privilege, which may prevent inquiry into and discovery of whether the legislator's "conduct was improperly motivated." *United States v. Johnson*, 383 U.S. 169, 180 (1966). That privilege applies to local government officials, *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), and even in some circumstances to their employees, *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (*per curiam*).

Beyond the difficulties of proving the subjective intent of elected or appointed government officials or their employees, in several states local ministerial associations are permitted to choose the legislative prayer-givers.[3] And of course all so-called legislative prayer involves individual prayer-givers, often (but not always) members of the clergy. Are litigants and the

[3] See National Conference of State Legislatures, Table 98-3, available at http://www.ncsl.org/documents/legismgt/ILP/02Tab5Pt7.pdf.

courts to take depositions, and even hold trials, to ferret out the subjective motivations and intentions of local officials or clergy (or even, in the case of school prayer, students)? We respectfully submit that this is not a sound road for this Court to send litigants and the lower courts down, especially in light of the free exercise and entanglement concerns that any such inquiries inevitably would raise.

Finally, any test focusing on subjective questions such as whether there was an improper "intent to proselytize" also would run against the tide of this Court's decisions in other areas of constitutional adjudication eschewing inquiries into the subjective motivations of government actors. *See, e.g., Brigham City, Utah v. Stuart*, 547 U.S. 398, 404-405 (2006) ("Our cases have repeatedly rejected" consideration of "officers' subjective motivations" as relevant to whether there was a Fourth Amendment violation); *Devenpeck v. Alford*, 543 U.S. 146, 154-55 (2004) ("Subjective intent of the arresting officer. . . is simply no basis for invalidating an arrest."); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 292 (2000) (rejecting argument that nude dancing ban should be struck down because "the city council . . . had an illicit motive in enacting the ordinance"); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) ("[T]his Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."); *United States v. Leon*, 468 U.S. 897, 923 n.23 (1984) ("'[S]ending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of

judicial resources'.") (citation omitted).

Current law compensates for all of these difficulties of proof by requiring courts to objectively assess the effects and impact of a practice. Petitioner and its *amici* would eliminate that back-up and have outcomes turn solely on a showing of improper purpose. We submit that the Court should not erect tests that public officials can all too easily evade with a wink and a nod. The First Amendment, like the Fourth Amendment, regulates government conduct, and in cases raising First Amendment challenges the focus likewise should be on actions and their objective effects and not on elusive questions of the propriety or illicitness of the subjective motives of individual actors. *See Edwards,* 482 U.S. at 636-639 (Scalia, J., dissenting).

Here, the Second Circuit rejected the argument that there could be no Establishment Clause violation where it was undisputed that "the town did not intentionally favor Christian prayer-givers." Pet. App. 17a n.3. We submit that the Second Circuit got that right, and that for the reasons set forth above the question raised in *Marsh* – i.e., whether a prayer practice is being exploited to "proselytize or advance any one, or to disparage any other, faith or belief," *Marsh*, 463 U.S. at 794-95 – is and should be an objective inquiry, focused, as the court below was, not on motivations but instead on effects. Pet. App. 17a n.3.

CONCLUSION

To be clear, we do not argue for banishing prayer from the public sphere. And affirming the Second Circuit, which we urge the Court to do, would not require such banishment. Both Respondents and the United States suggest practical and reasonable steps that could be taken to ameliorate Establishment Clause concerns in the context of prayer at meetings of local legislative bodies. *See* Brief of Respondent at 48-49; Brief for The United States as *Amicus Curiae* Supporting Petitioner at 23-24. The Second Circuit's decision below similarly outlined modestly different ways that the Town of Greece might implement a prayer program to avoid running afoul of the Establishment Clause. Pet. App. 24a-26a. All of these proposals share a good amount of common ground. The Town has not taken any of the suggested steps, but disclaims any intention to coerce, proselytize, or exploit in connection with its prayer program. So perhaps it might agree. But unless and until that time comes, the Court must assess the Town's prayer practice as reflected in the record on this appeal. We submit that this practice clearly crossed the vitally important line separating permissible government acknowledgment from unconstitutional government coercion, proselytization, advancement, endorsement, sponsorship, and encouragement of religion. Accordingly, and for the foregoing reasons and those stated in Respondents' brief, we respectfully urge the Court to affirm the Second Circuit and to decline to supplant decades of settled Establishment Clause case law with a coercion and/or non-proselytization test.

Dated: September 23, 2013

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AMICUS CURIAE BRIEF

RECORD
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IN THE
Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, AND REV. GRADYE PARSONS, STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.) AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The **Baptist Joint Committee for Religious Liberty** (BJC) serves fifteen Baptist entities, including national and regional conferences and conventions, working together to promote religious liberty for all through strong support of the principles of no establishment and free exercise. Grounded in the historical experience of Baptists, whose religious freedom struggles figured prominently in the fight for disestablishment in the American colonies, the BJC recognizes that religion and religious liberty are best served when government neither seeks to promote nor inhibit religion, but leaves religion to its own merits and the voluntary efforts of adherents.[1]

The BJC, which focuses exclusively on religious liberty and church-state issues, believes that religious freedom requires noninterference by the State in matters of faith and doctrine, and that the government has an affirmative duty to avoid any sponsorship of religion. Since its inception in 1936, the BJC has defended the constitutional boundaries between the institutions of religion and government in the U.S. Congress, the courts, and at the state and local levels. The BJC has filed amicus curiae briefs in more than one hundred cases in the courts, including

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amici* or their counsel made such a monetary contribution. All parties have consented to the filing of this brief through letters of consent on file with the Clerk of this Court.

most of the U.S. Supreme Court's cases dealing with religious liberty.

The BJC serves individuals and churches throughout the country. Due to the congregational autonomy of individual Baptist churches, the BJC does not purport to speak for all Baptists. The BJC's constituents are active participants in all levels of national, state, and local government and therefore have a direct interest in the constitutionality of government-sponsored prayer at each of these levels.

The **General Synod of the United Church of Christ** is the representative body of the national setting of the United Church of Christ (UCC). The UCC was formed in 1957, by the union of the Evangelical and Reformed Church and the General Council of the Congregational Christian Churches of the United States in order to express more fully the oneness in Christ of the churches composing it, to make more effective their common witness in Christ, and to serve God's people in the world. The UCC has 5,200 churches in the United States, with a membership of approximately 1.1 million.

The General Synod of the UCC, various settings of the UCC, and its predecessor denominations, have a rich heritage of promoting religious freedom and tolerance. Believing that churches are strengthened, not weakened, by the principle of the separation of church and state, the UCC has long acknowledged its responsibility to protect the right of all to believe and worship voluntarily as conscience dictates, and to oppose efforts to have government at any level support or promote the views of one faith community more than another. At its twentieth gathering, the General

Synod continued this legacy by encouraging the involvement of the United Church of Christ in a national campaign to promote the principle of the separation of church and state and the proper role of religion in society.

The **Reverend Gradye Parsons,** as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately 1,850,000 active members in 10,260 congregations organized into 173 presbyteries under the jurisdiction of 16 synods.

The Presbyterian Church's first constitution, adopted in 1788, stated that "the rights of private judgment, in all matters that respect religion," are "universal and unalienable" and should not be "aided by the civil power." Two centuries later, in 1988, the General Assembly reiterated this view, stating that "[r]eligious expression by the government itself or sponsored by the government threatens religious liberty."

The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statements binding on the membership of the Presbyterian Church. However, the General Assembly is the highest legislative and interpretive body for the denomination, and it is the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Town of Greece begins its town meetings with a communal prayer involving both government officials and its citizens. In challenging this practice, respondents focus primarily on the effect that petitioner's prayer practice has on the dissenters who do not share the Christian beliefs frequently conveyed by those prayers, persuasively demonstrating the pressure felt by religious minorities to conform and participate. But these prayers also infringe the rights of Christians who, like *amici*, believe that prayer is a voluntary, individual act of worship between the prayer-giver and God. In the views of these Christians, decisions regarding whether to pray—and, if so, when and how—must be made voluntarily by each person based on his or her own conscience, and not by the government. It is because of—not in spite of—the importance of prayer and religion that *amici* object to petitioner's "fusion of governmental and religious functions."[2]

Group prayer in a government forum violates a person's freedom to worship according to his or her own conscience. Although people of faith often pray collectively—for example, in churches, synagogues, and mosques—they make a voluntary decision to do so, exercising their constitutional right to form a congregation of persons who have the same approach to worshiping God. In contrast, attendees at a town meeting have not agreed to join a government-

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[2] *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982) (internal quotation marks omitted).

formed congregation. They come to participate in local government, not communal prayer. By opening a government meeting with an exercise of religious devotion, petitioner impermissibly transforms a political assembly into a religious congregation.

I. The First Amendment protects a person's freedom to choose when and how to worship God. The Religion Clauses of the First Amendment grew out of the Framers' understanding of religious worship as a voluntary expression of individual conscience. The Framers sought to protect religious freedom and the voluntary nature of religious devotion by "preventing a fusion of governmental and religious functions."[3] The Religion Clauses "mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State," and therefore "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission."[4]

The "liberty of conscience" in matters of religion has long been recognized as a natural right held by all persons. During the seventeenth century, both religious leaders and political theorists advanced arguments for separating church and state as a way to protect each person's liberty of conscience. Under these views, each person has the freedom to decide how to worship based on his own views of what is necessary to achieve salvation, and

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[3] *Id.* (internal quotation marks omitted).

[4] *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

the government cannot compel the person to perform or participate in religious acts.

The Founders were heavily influenced by these religious and secular arguments for religious freedom. They viewed liberty of conscience as an inalienable right, and intended for the First Amendment's Religion Clauses to protect that right. To James Madison, for example, religion "must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right."[5] During the late eighteenth century, views like Madison's were held by "nearly every politically active American writing on the subject of religion and the state."[6] Indeed, "[l]iberty of conscience . . . was the central value invoked by the states that proposed constitutional amendments on the question of religion, and the purpose that underlay the Establishment Clause when it was enacted."[7] To the Framers, the liberty of conscience was a delicate freedom that demanded strong protection from even the slightest intrusions by the government.

II. Petitioner's practice of beginning a participatory local government meeting with a communal prayer infringes the liberty of conscience of not just religious minorities, but also of Christians who believe that worship should be voluntary. The practice exerts, at a minimum, "subtle coercive

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[5] James Madison, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶ 1 (1785).

[6] *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 378 (2002).

[7] *Id.* at 351.

pressure" on meeting participants to participate in prayer.[8] Participants who would dissent from the government-sponsored prayer have no choice but to do so conspicuously, and risk compromising their standing before the Board, which could impair their ability to defend their personal interests. The Establishment Clause protects a citizen from being forced to choose between participating in local government and worshiping God according to his or her conscience.

Seeking to avoid these principles, petitioner argues this case is controlled by *Marsh v. Chambers*.[9] But nothing in *Marsh* permits a town meeting to function as a forum for government-led communal prayer. *Marsh* upheld a state legislature's substantially different "chaplaincy practice" under which the legislative body employed a chaplain to minister to its *own* members' religious needs without engaging the citizenry at large in the government's chosen prayer. Indeed, the history on which *Marsh* relies concerns an internal debate among delegates to the Continental Congress and the accommodation reached among themselves. Petitioner cites no separate history that justifies local governments forming for *others* an implied religious congregation.

Petitioner ignores the ways in which local board meetings "differ fundamentally from state legislative bodies."[10] Unlike state and national legislatures, local government bodies typically operate in a participatory manner, and thus the

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[8] *Lee*, 505 U.S. at 588.

[9] 463 U.S. 783 (1983).

[10] *Pelphrey v. Cobb*, 547 F.3d 1263 (11th Cir. 2008) (Middlebrooks, J., dissenting).

intended audience of a prayer service is not limited to elected representatives. Unlike state and national legislatures, local government bodies frequently decide individualized matters that *require* participation, such that a citizen may have no realistic choice but to attend the meeting—and any associated prayer. A passive visitor in the gallery of the U.S. Congress is simply in a different position than a citizen preparing to speak before a town board.

These are distinctions that make a constitutional difference. The Court should reject petitioner's attempt to redefine the Religion Clauses, and should instead reaffirm the Founders' understanding that prayer is an expression of voluntary religious devotion, not the business of the government.

ARGUMENT

I. The Establishment Clause Protects Liberty of Conscience and Genuine Religious Faith.

The First Amendment protects the rights of individuals and faith communities to engage in religious worship as a voluntary expression of individual conscience, and prohibits the government from interfering with those rights. Specifically, the Establishment Clause prevents the government from advancing or privileging religion and from violating the consciences of those who have different religious beliefs or no religious belief at all, while the Free Exercise Clause prevents the government from burdening or interfering with religious practice. The

Religion Clauses collectively reflect the Founders' intent to allow people of faith to practice their religion as they see fit without interference from the government.

Petitioner fundamentally confuses the proper relationship between church and state, and would deprive individuals of their freedom of conscience. In petitioner's view, its practice of opening participatory town meetings with explicitly Christian prayers complies with the Establishment Clause because the practice does not "coerce anyone to *adopt* a particular tenet or belief" or "condition[] any governmental benefits on participation."[11] In other words, petitioner would remove all constraints on the government's ability to sponsor faith-specific religious exercises so long as it does not compel actual belief or overtly punish citizens who refuse to participate. Petitioner's view disregards the history of the Establishment Clause, which demonstrates that the Founders intended much more robust protection for an individual's liberty of conscience.

A. A Religious And Secular Consensus on Rights of Conscience Forms The Historical Backdrop To The Establishment Clause.

Prominent religious and political thinkers in the seventeenth century developed the idea that an individual's liberty of conscience limits the authority of the state. Reacting to the religious strife and civil discord plaguing Europe in this era, these writers advanced theories of individual conscience, religious

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[11] Pet. Br. 39, 40 (emphasis added).

toleration, and the proper division between the civil and religious spheres. Particularly influential among them were the English Baptists, the American preacher and Founder of the First Baptist Church in America Roger Williams, and the political philosopher John Locke.[12] All began with the fundamental premise that true religious faith is a voluntary exercise of individual free will that must be shielded from government interference.

In the early seventeenth century, English Baptist pamphleteers argued that a strict separation of religious and worldly affairs must be maintained because God alone has authority in matters of religion. As one pamphlet put it, "[k]ings and magistrates are to rule temporal affairs by the swords of their temporal kingdoms, and bishops and ministers are to rule spiritual affairs by the word and Spirit of God . . . and not to intermeddle one with another's authority, office, and function."[13] These Baptists also argued that the state cannot force a person to worship against his conscience because such insincere worship is "most abominable" and "not acceptable to God."[14] According to these early Baptists, civil law could not compel performance of religious acts, for "if the intent of the law were to make me come to church to worship God, and not of

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[12] *See, e.g.*, Feldman, *supra*, at 357-72.

[13] Religious Peace: Or a Plea for Liberty of Conscience (1646), reprinted in TRACTS ON LIBERTY OF CONSCIENCE AND PERSECUTION: 1614-1661, at 23 (Edward Bean Underhill ed., Hadley Press 1846) (hereinafter TRACTS ON LIBERTY OF CONSCIENCE); *see also id.* at 99 ("There is but one Lord, and one Lawgiver, over his church.").

[14] *See, e.g.*, Persecution for Religion Judg'd and Condemn'd (1615), reprinted in TRACTS ON LIBERTY OF CONSCIENCE, at 104.

faith, [then] the intent of the law were to compel me to sin."[15]

These views influenced Roger Williams, who left England for the Massachusetts Bay Colony and advocated there for a "wall of separation between the garden of the church and the wilderness of the world."[16] Williams recognized that government sponsorship degrades religion's purity and integrity, because genuine faith must be arrived at independently, through one's own free will.[17] In Williams' view, "true religion does not need the support of carnal weapons."[18] Williams viewed a strict separation of church and state as necessary to permit religious faith to flourish in the face of the corrupting influence of worldly affairs.[19] For voicing such "new and dangerous opinions," Williams was expelled from Massachusetts in 1635.[20]

But over the next century, these "dangerous" ideas took hold. The view that liberty of conscience must be protected from government interference was not only adopted by religious thinkers, but also by

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[15] *Id.* at 105.

[16] Roger Williams, "Mr. Cotton's Letter Lately Printed, Examined and Answered," in Perry Miller, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 98 (1962).

[17] Roger Williams, The Bloudy Tenent, Of Persecution for Cause of Conscience (1644), reprinted in 3 COMPLETE WRITINGS OF ROGER WILLIAMS (Samuel L. Caldwell ed., 1963).

[18] *Id.* (quoted in Conrad H. Moehlman, THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 60 (1951)).

[19] *See* Baptists and the American Experience 16 (James E. Wood, Jr., ed., 1976).

20 1 Isaac Backus, A HISTORY OF NEW ENGLAND BAPTISTS 131 & n.2 (1871). A decade later, in 1644, Williams founded Rhode Island, a colony committed to religious toleration. Edwin S. Gaustad, ROGER WILLIAMS 13, 59-60, 70 (2005).

political theorists, including John Locke.[21] In Locke's view, "the care of souls is not committed to the civil magistrate."[22] Religious matters were therefore an exception to Locke's famous social compact, because individuals cannot surrender to government the power to compel in religious matters. Locke instead agreed with the Baptists that compelling others to engage in worship was "to command them to offend God."[23] In short, like the Baptists and Williams before him, Locke sought "to distinguish exactly the business of civil government from that of religion," and to clarify that the domain of the former does not extend to the "care . . . of every man's soul," which "belongs to himself, and is to be left to himself."[24]

B. The Establishment Clause Incorporates Robust Protection For Individual Conscience.

As this Court has recognized, there is a direct line from thinkers such as Roger Williams to the adoption of the Establishment Clause.[25] Judge

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[21] *See* Feldman, *supra*, at 368 (noting that Locke's arguments for liberty of conscience could be "heard . . . clearly in some of the Baptist pamphlets").

[22] John Locke, A LETTER CONCERNING TOLERATION 49 (Kerry Walters ed., 2013).

[23] *Id.* at 66.

[24] *Id.* at 48, 60.

[25] *See, e.g., Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 214 (1963) ("views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated . . . in the Federal Constitution"); *Engel v. Vitale*, 370 U.S. 421, 434 n. 20 (1962) (recognizing Williams as "one of the earliest exponents of the doctrine of separation of church and state"); *Lee*, 505 U.S. at 609 n.11 (Blackmun, J., concurring) (noting Williams' influence on the adoption of the Establishment Clause).

Michael McConnell observes that "the evangelical position ultimately coalesced with the secular liberal position," recognizing that "voluntary religious societies—not the state—are the best and only legitimate institutions for the transmission of religious faith and, with it, virtue."[26] And by the time of the Establishment Clause's enactment, "some version of Locke's basic view of the nature of the liberty of conscience had been formally embraced by nearly every politically active American writing on the subject of religion and the state."[27]

Like Locke, the Framers understood the liberty of conscience to mean, above all, a right not to be compelled to support or participate in religious activities at odds with one's personal beliefs.[28] And like Williams, they recognized that religious liberty and the flourishing of genuine religious faith depend on a strict division between the roles of government and religion.[29] These views are most clearly evident in the writings of James Madison and Thomas

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[26] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1442-43 (1990).

[27] *See* Feldman, *supra*, at 378; *see also* McConnell, *supra*, at 1430-31 (noting the depth of Locke's influence on the Framers).

[28] *See* Feldman, *supra*, at 398-412.

[29] *See Engel*, 370 U.S. at 431 (stating that the Establishment Clause is based on "the belief that a union of government and religion tends to destroy government and to degrade religion"); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.").

Jefferson, two of the most important political figures in the enactment of the Religion Clauses.[30]

James Madison explained that religion "must be left to the conviction and conscience of every man" and that "religion is wholly exempt from [civil society's] cognizance."[31] He warned that government interference with the practice of religion was "an offence against God" and a violation of the natural rights of man.[32] Madison also identified the danger to religion itself, writing that an established religion would "weaken in those who profess this Religion a pious confidence in its innate excellence and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust it to its own merits."[33]

Thomas Jefferson's writings reflect a similar recognition of the primacy of individual conscience in matters of religion. He famously wrote that "no man can conform his faith to the dictates of another. The life and essence of religion consists in the internal persuasion or belief of the mind."[34] And Jefferson further cautioned that government-sponsored

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[30] *See* McConnell, *supra*, at 1455 ("No other political figure played so large a role in the enactment of the religion clauses as Jefferson and Madison.").

[31] James Madison, Memorial and Remonstrance Against Religious Assessments ¶ 1 (1785).

[32] *Id.* at ¶¶ 1-4.

[33] *Id.* at ¶ 6.

[34] Thomas Jefferson, Notes on Locke and Shaftesbury (1776), reprinted in 1 THE PAPERS OF THOMAS JEFFERSON 544, 545 (Julian P. Boyd ed., Princeton Univ. Press 1950).

religion "tends . . . to corrupt the principles of that very religion it is meant to encourage."[35]

Although the Framers broadly agreed that the liberty of conscience was an inalienable right, the Constitution lacked an express provision protecting that right.[36] This omission proved controversial, and ratifying conventions in every state but one proposed an amendment that explicitly protected the freedom of conscience.[37]

Like the proposals at the state ratifying conventions, early drafts of the Religion Clauses debated by Congress explicitly referenced "rights of conscience."[38] Although the final formulation of the First Amendment omitted an explicit reference to "conscience," there is no historical evidence that any substantive change was intended. Rather, the omission reflects the understanding that the Establishment and Free Exercise Clauses adequately protect the liberty of conscience.[39]

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[35] Thomas Jefferson, THE VIRGINIA ACT FOR ESTABLISHING RELIGIOUS FREEDOM (1786).

[36] Even without such a provision, however, Article VI barred the use of a "religious test" as a qualification for office. Joseph Story explained that the purpose of this clause was "to cut off for ever every pretence of any alliance between church and state in the national government." 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1841 (1833).

[37] Feldman, *supra*, at 401-02.

[38] See, e.g., 1 Annals of Cong. 451 (June 8, 1789) (Joseph Gales ed., 1834) ("The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.").

[39] *See* Feldman, *supra*, at 404 ("The reasons for the Senate's omission of the reference to conscience are not clear. What is certain is that the notion of liberty of conscience was not being abandoned; rather, protection of free exercise and a ban on

As history demonstrates, the Founders understood the Establishment Clause to protect each person's liberty of conscience in a way that is fundamentally inconsistent with petitioners' view of the clause. On the floor of the First Congress, Rep. Daniel Carroll explained that "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of government hand."[40] Debates in Pennsylvania further illustrate that liberty of conscience was understood to protect individuals from being "compelled contrary to their principles and inclination to *hear* or support the clergy of any one religion."[41] And Jefferson condemned pressure to "*frequent* or support any religious worship, place, or ministry whatsoever."[42] Petitioner's notion that the government may lead citizens assembled for official purposes in Christian prayer offends the Framers' basic understanding of the liberty of conscience that they had committed to protect "in the fullest latitude."[43]

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establishment, taken together, were thought to cover all the ground required to protect the liberty of conscience.").

[40] 1 Annals of Cong. 757 (Aug. 15, 1789) (Joseph Gales ed., 1834).

[41] Feldman, *supra*, at 398 (emphasis added) (quoting PETITION AGAINST CONFIRMATION OF THE RATIFICATION OF THE CONSTITUTION, Jan. 1788); *see also id.* ("[N]o man ought, or of right can be compelled to *attend* any religious worship." (emphasis added) (quoting Timothy Meanwell, Phila. Indep. Gazetteer, Oct. 29, 1787)).

[42] Thomas Jefferson, THE VIRGINIA ACT FOR ESTABLISHING RELIGIOUS FREEDOM (1786).

[43] Letter from James Madison to George Eve (Jan. 2, 1789), available at http://www.constitution.org/jm/17890102_eve.htm.

II. Prayer At Local Government Meetings Violates The Establishment Clause.

The Establishment Clause protects the liberty of conscience by prohibiting the sort of government-sponsored prayer at issue in this case. Immediately before conducting its official business, the Town of Greece invites a prayer-leader to face the assembled participants and offer a prayer, usually Christian, on the assembled citizens' behalf. This state-sponsored, faith-specific, communal worship achieves an impermissible "fusion of governmental and religious functions."[44] It asks anyone who disagrees with petitioner's views on the appropriate venue, timing, and content of prayer to "pray in a manner her conscience will not allow."[45] And it demeans genuine faith by placing the power of the state behind a particular creed. Establishment Clause precedent and principles bar this practice.

A. Petitioner's Prayer Practice Violates The Establishment Clause By Infringing The Rights Of Conscience Of Those In Attendance.

Petitioner's practice of beginning a participatory local government meeting with a prayer service violates the Establishment Clause because it improperly infuses the work of government with religion, and impermissibly compromises the rights of conscience of citizen participants. As respondents correctly explain, when municipalities unite a town meeting with communal

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[44] *Larkin*, 459 U.S. at 126.

[45] *Lee*, 505 U.S. at 593.

worship, the dissenting citizen is put on the horns of a dilemma: jeopardize access to the most accessible and participatory level of government, or compromise one's conscience by joining insincerely in prayer. But this dilemma is not limited to non-Christians; many Christians believe, as *amici* do, that their freedom of conscience is violated when they are pressured to participate in government prayer, because such acts of worship should only be performed voluntarily.

The Establishment Clause protects the right of both Christians and non-Christians to participate in local government without joining others in prayer. As Madison recognized, each person has an inalienable freedom of conscience, which requires that "[t]he Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[46] By opening its town meetings with a prayer in which the citizenry is asked to join the government officials in praying to God (and often specifically to Christ), petitioner violates the freedom of conscience of each attendee for whom a town meeting is neither the time nor place for communal prayer, or who has theological differences with the government-deputized prayer-leader.

Petitioner's prayer practice cannot be reconciled with the Establishment Clause by characterizing participation in it as voluntary. As the Court held in *Lee v. Weisman*, "overt religious exercise[s]" are not permitted in state-sponsored communal events where "subtle coercive pressure

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[46] James Madison, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶ 1 (1785).

exists," even though participation is formally optional.[47] In *Lee*, the Court held that prayer at a graduation ceremony violated the Establishment Clause even though no student was compelled to believe the prayer-giver's message, or would have been punished for refusing to take part. Rather, the Court recognized that when the government exerts pressure on an individual "to pray in a manner her conscience will not allow," it violates the core value the Establishment Clause was enacted to protect.[48]

This conclusion follows directly from the Framers' recognition that the freedom of conscience is "of peculiar delicacy" and therefore required protection from even "the gentlest touch of government hand."[49] Just as the Framers understood that citizens should not be made to "frequent" worship services,[50] so too would they have seen the danger in government bringing devotional exercises directly to citizens assembled for official

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[47] 505 U.S. at 588; *see also Engel*, 370 U.S. at 431 ("When the power, prestige and financial support of government is placed behind a particular religious belief, the *indirect* coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." (emphasis added)).

[48] *Lee*, 505 U.S. at 593.

[49] 1 Annals of Cong. 757 (Aug. 15, 1789) (Rep. Daniel Carroll) (Joseph Gales ed., 1834). To be sure, *Lee* was a case concerning minors. But while the Court found that the dangers to "freedom of conscience" were "heightened" in the school context, it did not adopt a formalistic bright line between children and adults. 505 U.S. at 592 (noting that the Court's concern about protecting conscience was not "limited to the context of schools," even if they were "most pronounced there"). Nothing in the Founders' conception of the freedom of conscience—which was "of peculiar delicacy"—suggests that adults are immune from subtle coercive pressures.

[50] Thomas Jefferson, THE VIRGINIA ACT FOR ESTABLISHING RELIGIOUS FREEDOM (1786).

purposes. As the Court explained in *Lee*, "if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people."[51]

Petitioner's prayer practice exerts, at a minimum, "subtle" and "indirect" pressure on those who disagree with the practice. The prayer-leader actually faces (and gives instructions to) the assembled citizens rather than the Board members.[52] Attendance is sparse (generally ten non-Board participants), and Board members identify participants by their first names.[53] Participants who would dissent from petitioner's worship service therefore have no choice but to do so conspicuously. If they come to advocate for their beliefs and defend their personal interests (as they have the right to do), they must decide whether to risk their standing before the council by broadcasting their objection to the prayer.

In sum, "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice."[54] But in the Town of Greece, that is precisely the price of exercising one's right to participate in local government. This choice directly undercuts the Framers' objective of "ensur[ing] that

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[51] 505 U.S. at 592.

[52] *See* Resp. Br. 8-9.

[53] *See* http://tinyurl.com/publicforums (Board member calling up a citizen at the 0:35 mark of the video, and saying "Welcome, Joe," without the citizen introducing himself).

[54] *Lee*, 505 U.S. at 596.

religious dissenters *could participate in government* fully and equally."[55] By flouting this tenet, petitioner's prayer practice violates the Establishment Clause.

B. *Marsh* Does Not Exempt Petitioner's Prayer Practice From Ordinary Establishment Clause Principles.

Petitioner contends that *Marsh* controls the outcome of this case because it upheld a "legislative prayer" practice, and petitioner considers its practice to be "legislative prayer." That sort of context-free formalism misunderstands *Marsh*, undercuts Establishment Clause values, and contravenes this Court's precedent.[56] Regardless of whether petitioner labels its practice as "legislative prayer," it is nothing like the practice upheld in *Marsh*.

In *Marsh*, the Court recognized the sensitive nature of government involvement in prayer. It upheld prayers before legislative sessions, offered for the legislators themselves—elected representatives who have voluntarily sought and appointed a chaplain to provide the guidance of prayer. *Marsh* cannot be unmoored from the tradition of chaplaincy that has played a central role in accommodating the religious needs in distinctive governmental settings. *Marsh* does not create a sweeping exception to the Establishment Clause permitting unbounded government-led religious devotion, including faith-specific government-sponsored prayer in participatory town meetings. Petitioner seeks a view

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[55] Feldman, *supra*, at 351 n. 26 (emphasis added).

[56] *See Lee*, 505 U.S. at 595 (rejecting defense of prayer practice as "formalistic in the extreme").

of *Marsh* and the Establishment Clause that is unprecedented and unjustified in this Court's jurisprudence.

1. *Marsh* considered a practice under which the Nebraska Legislature employed a chaplain to minister to its Members as they performed their duties. Although Members represent their constituents' interests, citizens do not participate in the internal functioning of the Nebraska Legislature.[57] Thus, as the record in *Marsh* established, the chaplain's prayers were "an internal act" directed to the Legislature's "own members," and lacked "significant impact on anyone else."[58] The practice instead was cognizant of and reflected the collective religious needs of the Members themselves; for example, the chaplain "removed all references to Christ" to account for the beliefs of a Jewish legislator.[59]

The "unique history" of this practice—which provided the basis for upholding it[60]—is instructive. *Marsh* identifies a tradition stemming from the Continental Congress and discusses in detail the debate over prayer between delegates at that Congress.[61] John Jay and John Rutledge objected to opening their session with prayer because "*we*"—*i.e.*, the delegates—"were so divided in religious sentiments, some Episcopalians, some Quakers, some Anabaptists, some Presbyterians, and some

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[57] *See* R. Neb. Unicameral Leg. 2, § 3.

[58] *Marsh v. Chambers*, 504 F. Supp. 585, 588 (D. Neb. 1980).

[59] *Marsh*, 463 U.S. at 793, n. 14.

[60] *Id.* at 791.

[61] *Id.* at 791-92.

Congregationalists."[62] Meeting this objection, "Samuel Adams arose and said *he* was no bigot," and *he* "could hear a prayer from a gentleman of piety and virtue."[63]

This historical vignette strikingly highlights the inward-looking nature of the debate over prayer before a session of Congress. Opponents focused on the internal religious diversity among the delegates; Samuel Adams answered with his personal view that he would not take offense to "hear[ing]" a prayer he might disagree with. It is unsurprising and admirable that this eminent group could accommodate their differences and seek Divine guidance for their important task, without compromising their own conscience and beliefs. But this history does not suggest that the Founders put aside their views on liberty of conscience and presumed to form an implied religious congregation for *others*.

The tradition of legislators viewing their chaplain as a resource for their own religious needs has continued throughout the practice's "unique history." When Congress considered objections to the practice in the 1850s, it rejected the notion that it had established "a national chaplaincy," and thought employing a chaplain to serve the religious needs of Members was no different than "hav[ing] officers who attend to the private secular business of the

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[62] Charles F. Adams, FAMILIAR LETTERS OF JOHN ADAMS AND HIS WIFE, ABIGAIL ADAMS, DURING THE REVOLUTION 37 (1876) (emphasis added).

[63] *Id.* (emphasis added).

members."[64] Congress has likewise followed the tradition of striving for consensus in chaplaincy matters. For example, in the U.S. House of Representatives, where internal matters are typically governed by the majority party, the chaplain is jointly selected by both parties.[65] The chaplain has "an ecumenical ministry," and strives to "serve all the Members"—not the Nation at large—whether they are "Roman Catholic, Jewish, or Protestant," affiliated with another religion, or "not affiliated with any religious group."[66] This process of selecting a legislative chaplain further demonstrates both the inward-looking nature of the legislative prayer practice upheld in *Marsh*, and the legislators' ability to ensure that the chaplain offers prayers that meet their own religious needs—two factors that are absent in petitioner's prayer practice.

The legislative chaplaincy practice upheld in *Marsh* reflects the Nation's longstanding

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[64] S. Rep. 32-376, at 2-3 (1853) ("The chaplain is an officer of the house which chooses him, and nothing more."); *see also* H.R. Rep. 33-124, at 7 (1854) (stating that Members of Congress "surely need to have their views of *personal* importance daily chastened by the reflection that they are under the government of a Supreme Power" (emphasis added)). Senator Robert Byrd much later observed that the chaplain's prayers "could often help members who were caught up in their own immediate battles to put the nation's needs into perspective." 2 Robert C. Byrd, THE SENATE, 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE 305 (1991).

[65] Memorandum from James D. Ford, Chaplain of the U.S. House of Representatives, to the Chaplain Nominating Committee of the House of Representatives (June 8, 1999).

[66] *Id.* at 1. When a new chaplain was selected in 2000, candidates were specifically told about the "ecumenical" nature of the ministry, and asked of their comfort working with the "many religious groups *that we have in Congress*." House Chaplain Selection Committee, Final Report, Attachment 13 (Jan. 2000) (emphasis added).

accommodation of specific religious needs without combining the religious with the political or compromising the consciences of individual citizens. In other limited contexts, such as the military, prisons, and government hospitals, the government may facilitate voluntary religious practice through government-supported chaplains to meet the religious needs of those who, by reason of deployment or confinement, have limited access to opportunities for worship or pastoral care.[67] Far from supporting the faith-specific prayers at issue in this case, these chaplaincy practices underscore an important limit on government involvement in religion. The chaplain may perform his duties according to his specific faith in contexts in which participation is strictly voluntary.[68] Outside of this context, chaplains must recognize and respect the environment of religious pluralism in which they function.[69] Chaplains in these government settings—unlike many of the prayer-leaders at

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[67] *See, e.g., Theriault v. Silber*, 547 F.2d 1279 (5th Cir. 1977) (prison chaplaincy); *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985) (military chaplaincy); *Carter v. Broadlawns Medical Center*, 857 F.2d 448 (8th Cir. 1988) (hospital chaplaincy). *See generally* Ira C. Lupu and Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. Va. L. Rev. 89 (2007).

[68] *See, e.g., Anderson v. Laird*, 466 F.2d 283, 298 (D.C. Cir. 1972) (Leventhal, J., concurring) ("[T]he special case of the military permits Government aid for religious worship—assuming the core element of voluntarism on the part of the attending military personnel."); AR 165-1 Army Chaplain Corps Activities, § 2-1(b) (2009) ("Participation in religious activities is voluntary"); SECNAV Instruction 1730.7D Religious Ministry Within the Department of the Navy, 6.c (2008) ("Attendance at divine services shall be voluntary").

[69] *See, e.g.*, DoD Instruction 1100.22, "Policy and Procedures for Determining Workforce Mix," Enclosure 4, Section 1(e)(2)&(3) (Apr. 12, 2010); SECNAV Instruction 1730.7D, 5.e.2.

petitioner's town meetings—respond to the needs of those they serve and are sensitive to the lack of consensus on how to pray among even Protestants, much less Protestants, Catholics, Jews, and Muslims, and can tailor their prayers accordingly.[70]

2. Petitioner cites no separate "unique history" or tradition justifying its prayer practice, relying exclusively on its analogy to the chaplaincy practice upheld in *Marsh*. But petitioner's practice is hardly analogous, in part because local board meetings "differ fundamentally from state legislative bodies."[71] Unlike Congress and every state legislature, virtually all local governments hold "open meetings" in which citizens are invited to participate and comment on local issues.[72] In fact, local government has been uniquely participatory since the Founding: de Tocqueville memorably observed that "[t]own meetings are to liberty what primary schools are to science; they bring it within the people's reach."[73]

Local board meetings directly affect citizens in a way that legislative meetings do not. The issues

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[70] *See* Army Chaplain Corps Requirements, http://www.goarmy.com/chaplain/about/requirements.html (last visited Sept. 21, 2013) (requiring Army chaplain to be "[s]ensitive to religious pluralism" and "provide for the free exercise of religion by all military personnel").

[71] *Pelphrey*, 547 F.3d at 1288 (Middlebrooks, J., dissenting); *see also id.* (extending "the legislative prayer exception beyond the Congress or state legislatures" causes *Marsh*'s "historical justification [to] disappear").

[72] *See* 4 Eugene McQuillin, MUNICIPAL CORPORATIONS § 13:10 (3d ed. 2011); Brian Adams, *Public Meetings and the Democratic Process*, 64 Pub. Admin. Rev. 43, 44-45 (2004).

[73] Alexis de Tocqueville, DEMOCRACY IN AMERICA 46 (Bruce Frohnen ed., 2002).

involved are more personal: local government typically considers zoning, land development, and local budget matters, so participants often have strong personal stakes in the issues being decided.[74] At the same time, the "localized nature" of these decisions may make officials more "susceptible to community pressures, political influences, and personal bias."[75] That is particularly true given that Board members may know the participating citizens personally.[76]

Thus, when such a meeting opens with prayer, the religious dissenter is in a far different position than a passive spectator in the anonymous setting of a visitor's gallery. Since the meeting is participatory and communal, the prayer is not an internal matter among legislators representing distant constituents. In fact, in the Town of Greece, prayer-leaders turn their backs to the Board and face—and give instructions to—the participants.[77] In this setting, participants who would dissent from petitioner's worship service have no choice but to do so conspicuously. If they come to advocate for their beliefs and defend their personal interests, they must decide whether to risk showing disrespect to the Board members by refusing to participate in the communal prayer service the Board instituted. As a practical matter, citizens have "no real alternative

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[74] *See* William H. Baker et al., *Critical Factors for Enhancing Municipal Public Hearings*, 65 Pub. Admin. Rev. 490, 493 (2005).

[75] M. Dennison, *Dealing with Bias and Conflicts of Interest*, ZONING NEWS (Nov. 1994), available at http://www.rhdc.org/sites/default/files/Dealing_With_Bias.pdf.

[76] *See* http://tinyurl.com/publicforums.

[77] *See* Resp. Br. 8-9, 11.

which would . . . allow[] [them] to avoid the fact or appearance of participation."[78]

3. Finally, the *Marsh* Court signaled that the accommodation it upheld was not without limits. The Court held that it need not concern itself with the content of the prayers "where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[79] In other words, even in finding an acceptable context for prayer in a government setting, the Court remained concerned about the "clearest command" of the Establishment Clause, that government may not prefer one religion over another.[80] *Marsh* recognized that factual circumstances will inform the appropriate level of judicial inquiry in each case. Petitioner cannot simply label its practice "legislative prayer" and ignore the differences between its prayers and the ones offered in *Marsh*.

In sum, decisions by members of Congress and state legislatures to employ a chaplain that would invoke Divine guidance on their behalf does not suggest—and *Marsh* did not hold—that government may assume the authority to lead citizens in faith-specific communal prayer as a component of a participatory government meeting.[81]

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[78] *Lee*, 505 U.S. at 588.

[79] *Marsh*, 463 U.S. at 794-95.

[80] *Larson v. Valente*, 456 U.S. 228, 244 (1982).

[81] Declining to extend *Marsh* to municipal government meetings would also be consistent with this Court's approach in other areas, where it has recognized that differences between levels of government call for different treatment in the law. *See Frothingham v. Mellon*, 262 U.S. 447, 487 (1923) (distinguishing municipal taxpayer standing based on the

CONCLUSION

Petitioner's fundamental mistake is captured by its view of communal prayer as a "ceremonial acknowledgement[] of religion."[82] Holding aside the pressure it places on non-believers and religious minorities, to many Christians prayer cannot be reduced to mere "ceremony." Rather, prayer is an act of communication with God that is profound, personal, and—crucially—voluntary.

The Religion Clauses of the First Amendment respect the individual, voluntary nature of prayer by allowing each person to worship God as dictated by his or her own conscience, and by prohibiting the government from interfering with this right. Petitioner's practice of opening town meetings with a faith-specific, communal prayer violates the Establishment Clause because it infringes the freedom of conscience guaranteed to each person.

"peculiar relation of the corporate taxpayer to the [municipal] corporation"); *Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (rejecting immunity for municipalities because, unlike qualified immunity for state officials, there was "no tradition of immunity for municipal corporations").

[82] Pet. Br. 39.

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AMICUS CURIAE BRIEF

No. 12-696

In the Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a legislative-prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

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INTEREST OF THE AMICUS[1]

The Becket Fund for Religious Liberty is a non-profit, public-interest legal and educational institute that protects the free expression of all faiths. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. The Becket Fund believes that because the religious impulse is natural to human beings, public and private religious expression is natural to human culture.

The Becket Fund has long worked to prevent abuse of the Establishment Clause to exile religion from public life. For example, The Becket Fund has defended against Establishment Clause challenges to a multi-faith religious display, *ACLU of New Jersey* v. *Schundler*, 168 F.3d 92 (3d Cir. 1999) (represented city), privately-owned highway crosses erected to honor fallen state highway troopers, *American Atheists, Inc.* v. *Davenport*, 637 F.3d 1095 (10th Cir. 2010 (represented State *amici*), and the use of a church auditorium for a high school graduation, *Elmbrook School District* v. *Doe*, No. 12-755 (cert. pet. pending) (representing petitioner).

The Becket Fund is concerned that the Second Circuit's decision, if affirmed, would eliminate the nation's long tradition of legislative prayer and would unjustly exile religious ideas and speech from the public square.

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[1] No party's counsel authored any part of this brief. No person other than the *Amicus Curiae* contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters indicating consent are on file with the Clerk.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Marsh v. *Chambers* held that faith-specific legislative prayer was not an establishment, because the Founders who wrote the Establishment Clause did not view it as one. 463 U.S. 783 (1983). As Petitioner has demonstrated, that alone should be enough to decide this appeal. Pet. Br. 16-27.

But this case is about more than correcting the Second Circuit's error in refusing to follow *Marsh*. It also presents the deeper doctrinal question of how to reconcile *Marsh*, which was decided in 1983, with the "endorsement" test derived from *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), which was decided twelve years earlier, and which now dominates Establishment Clause jurisprudence in the lower courts.

The relationship between *Marsh* and the "endorsement" test is a puzzle. Because they use entirely different methods of deciding whether there has been an Establishment Clause violation, the question arises: Which is the norm, and which the aberration?

The "endorsement" test starts from the premise that an "establishment of religion" is in the eye of the beholder—in particular, in the eye of the "ordinary, reasonable" beholder. Pet. App. 17a, 20a. If the ordinary, reasonable beholder would interpret the government's action "as endorsing a particular faith or creed over others," the action is unconstitutional. *Ibid.* This standard is notoriously "formless, unanchored, [and] subjective." *Doe* v. *Elmbrook Sch. Dist.*, 687 F.3d 840, 872 (7th Cir. 2012) (en banc) (Posner, J., dissenting). It has also produced widespread confusion and division in the lower courts. See *Utah Highway Patrol Ass'n* v. *Am. Atheists, Inc.*, 132 S. Ct.

12, 13 (2011) (Thomas, J., dissenting from denial of certiorari) ("Establishment Clause jurisprudence [is] in shambles.").

Marsh, by contrast, starts from the premise that an "establishment of religion" had a defined meaning at the time of the founding, and that history is an important guide to interpreting the Establishment Clause. As *Marsh* put it: "[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress." 463 U.S. at 790. In other words, "their actions reveal their intent." *Ibid.* Because legislative prayer was common at the time of the founding, the historical method in *Marsh* yielded a straightforward result.

Marsh's historical method is far more reliable than the malleable "endorsement" test. It is also more consistent with the historical method applied by the Court in other areas of constitutional law, including under the Second Amendment, Fourth Amendment, Sixth Amendment and Fourteenth Amendment. In all of these areas, the Court routinely looks to the historical meaning of key constitutional terms. See, *e.g.*, *Apprendi* v. *New Jersey*, 530 U.S. 466, 478 (2000) (examining "the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding"); *Crawford* v. *Washington*, 541 U.S. 36, 43 (2004) (examining "the historical background of the [Sixth Amendment's Confrontation] Clause to understand its meaning"); *District of Columbia* v. *Heller*, 554 U.S. 570, 598 (2008) (examining "the history that the founding generation knew" to interpret the Second Amendment) and *id.* at 642 (Stevens, J., dissenting)

(examining "contemporary concerns that animated the Framers"); *United States* v. *Jones*, 132 S. Ct. 945, 950 & n.3 (2012) (examining the "original meaning of the Fourth Amendment," because "we must assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted") (citations omitted). Indeed, in this Court's most recent Establishment Clause case, the Court relied heavily on just such an historical analysis. *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 702-4 (2012) (describing historical problems with English governmental control of church bodies and concluding "[i]t was against this background that the First Amendment was adopted"). Thus, this Court should affirm that the historical method of *Marsh* is an accepted and, in fact, the preferred means of interpreting the Establishment Clause.

But the Court should also take this opportunity to deepen the historical analysis offered in *Marsh*. Although *Marsh* convincingly showed that legislative prayer was common at the founding, and that the Founders did not view legislative prayer as an establishment, 463 U.S. at 786-792, *Marsh* failed to explain *why* the Founders did not view prayer as an establishment. This failure to explain the Founders' reasoning has limited *Marsh*'s usefulness to lower courts in deciding Establishment Clause cases outside the legislative prayer context.

* * * * *

The purpose of this brief is to answer the question *Marsh* did not: Why did the Founders view legislative prayer as unobjectionable? First, we demonstrate that faith-specific legislative prayer was even more

common at the founding than was described in *Marsh*.

Second, we show that legislative prayer was unremarkable because the Founders understood an "establishment of religion" to consist of four key elements—(1) government financial support of the church, (2) government control of the doctrine and personnel of the church, (3) government coercion of religious beliefs and practices, and (4) government assignment of important civil functions to the church—all linked by an underlying concern about state coercion to participate in religious activity. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003). Because faith-specific legislative prayer lacked any of these elements, the Founders viewed it as unobjectionable.

Third, we explain how *Marsh*'s historical analysis is a good fit with the outcomes in the rest of this Court's Establishment Clause jurisprudence. Although this Court's modern Establishment Clause jurisprudence has not always adopted an explicitly historical method, the results largely track the four elements of establishment recognized by the Founders. Thus, the historical method is consistent both with the Founders' understanding of establishment and with this Court's precedent.

ARGUMENT

I. Legislative prayer was an accepted practice at the founding and has been ever since.

Legislative prayer was common at the founding, and that tradition continued through the adoption of the Fourteenth Amendment down to the present day.

Moreover, this prayer was typically faith-specific, including express references to Christ or to Jewish and Christian scriptures. Under the historical method adopted in *Marsh*, this means that faith-specific language in a prayer cannot, standing alone, make the prayer unconstitutional.

A. The founding generation practiced, encouraged, and funded legislative prayer.

There are numerous examples of faith-specific legislative prayer during the founding era. Respondents would view these faith-specific prayers as "sectarian" and, hence, unconstitutional.[2] But under *Marsh* and

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[2] The word "sectarian" is pejorative. See *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1258 n.5 (10th Cir. 2008) (McConnell, J.) ("We recognize that the term 'sectarian' imparts a negative connotation * * * * [and that] the Supreme Court has not used the term in recent opinions * * * *"). As this Court has recognized, the word has a "shameful pedigree" of nativist sentiment against recent Catholic immigrants, epitomized by the Blaine Amendments. *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality op.). In fact, "it was an open secret that 'sectarian' was code for 'Catholic.'" *Id.* at 828. See also *Locke* v. *Davey*, 540 U.S. 712. 273 n.7 (2004) (noting "link" between Blaine Amendments and anti-Catholicism). Thus, "sectarian" is not less patronizing and discriminatory than other terms that have long since disappeared from the judicial lexicon, such as "colored," "imbecile," "idiotic," and "[t]he natural and proper timidity and delicacy which belongs to the female sex." See *Plessy* v. *Ferguson*, 163 U.S. 537, 551 (1896) (rejecting "assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."); *Buck* v. *Bell*, 274 U.S. 200, 207 (1927) ("Three generations of imbeciles are enough."); *Doe* v. *Rowe*, 156 F. Supp. 2d 35, 54 (D. Me. 2001) (state's use of "archaic" and "stigmatizing" "terms * * * such as 'idiotic'" supported mentally disabled persons' equal protection claim); *Bradwell* v. *Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) ("natural and

the historical method it uses, there can be no question that faith-specific legislative prayer is not an establishment.

1. The Founders engaged in legislative prayer even before the Revolution. As both *Marsh* and Petitioner points out, Pet. Br. 28-29, a prominent example occurred in 1774, when the Continental Congress convened to determine the fate of the thirteen colonies. *Marsh*, 463 U.S. at 787. Two delegates objected to a prayer "because [they] were so divided in religious sentiments * * * that [they] could not join in the same act of worship." *Id.* at 791-2. (citing a letter from John Adams to Abigail Adams, C. Adams, *Familiar Letters of John Adams and his Wife, Abigail Adams, during the Revolution* 37-38 (1876)). But Samuel Adams quelled the objections by asserting that "he was no bigot, and could hear a prayer from any gentleman of Piety and Virtue, who was at the same time a friend to his country." *Ibid.* Accordingly, the delegates agreed on an Episcopal minister, and the next morning he opened the meetings with a prayer "in the name and through the merits of Jesus Christ." Office of the Chaplain, *First Prayer of the Continental Congress, 1774,* U.S. House of Representatives, http://chaplain.house.gov/archive/continental.html (last visited August 1, 2013). Nor was the prayer a mere formality. John Adams reported to his wife that he had "never heard a better prayer," and that it "filled the bosom of every man present" and "had an excellent effect upon everybody here." 1 Anson Phelps Stokes, *Church and State in the United States* 450 (1950).

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proper timidity" reason not to allow women to become attorneys).

This debate strongly affirms the constitutional pedigree of legislative prayer, because, as *Marsh* explained, the debate "infuses [the historical argument] with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly." *Marsh*, 463 U.S at 791. And the result of the debate was a prayer that expressly invoked the name of Jesus Christ.

The Founders decided at the same time to fund legislative prayer. Beginning in 1774, the Continental Congress chose to open "its sessions with a prayer offered by a paid chaplain." *Marsh*, 463 U.S. at 787. The First Congress continued this practice by a formal statute passed in 1789—three days before it reached final agreement on the language of the Bill of Rights. *Id.* at 788.

Even apart from the paid chaplain, the Continental Congress itself encouraged and participated in faith-specific prayers. The Continental Congress's first Thanksgiving Proclamation in 1777 invoked Christ and encouraged the country to join it in prayerfully seeking God's blessing via "humble and earnest supplication * * * through the merits of Jesus Christ." 9 Journals of the Continental Congress, 1774-1789 at 855 (Worthington Chauncey Ford ed., 1904)). Similarly, the Continental Congress "sprinkled its proceedings liberally" with references to Jesus Christ and Christianity. Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 217 (1986).

While apparently none of the prayers of the chaplain hired by Congress have survived from the period between the Continental Congress and the death of George Washington in 1799, high government offi-

cials issued a number of public prayers that reflected the national tone. For instance, just before his retirement from the Continental Army in 1783, George Washington wrote a letter to all of the governors of the victorious United States, of which the last paragraph consisted of a now famous prayer, invoking both the Jewish prophet Micah and the example of Christ.[3]

Congress also encouraged citizens to pray. For example, the Continental Congress proclaimed a national day of humiliation and fasting on July 20, 1775, which was known as "Congress Sunday." Harry M. Ward, *The War for Independence and the Transformation of American Society: War and Society in the United States, 1775-83* 15 (2003). Colonial governments without established churches did the same. For instance, on April 3, 1777, and again on April 22, 1778, the Supreme Executive Council of Pennsylvania proclaimed days of fasting and prayer. The Minutes of the Supreme Executive Council of Pennsylvania 176, 439 (1852). Rhode Island did the same. See, *e.g.*, 7 Records of the Colony of Rhode Island and Providence Plantations in New England, 249-250 (John Russell Bartlett, ed., 1862) (proclaiming June 30, 1774 a day of fasting, prayer, and supplication for

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[3] Washington's letter stated:

> I now make it my earnest prayer, that God would * * * most graciously be pleasd to dispose us all, to do Justice, to love merc, and to demean ourselves with that Charity, humility & pacific temper of mind, which were the Characteristiks of the Divine Author of our blessed Religion, & without an humble imitation of whose example in these things, we can never hope to be a happy Nation.

Stokes, *supra*, at 494.

the City of Boston, which was then suffering under the Boston Port Act).

2. The Founders also engaged in legislative prayer after the Revolution, when the Bill of Rights was being considered. In his 1789 inauguration, George Washington set the precedent for inaugural religious solemnities. Based on a schedule set by the House and Senate, following his swearing in, Washington conducted a "grand procession" (which included the members of the Senate and the House) to St. Paul's Episcopal Church for an assembly. Stokes, *supra* at 485; see also 1 Annals of Cong. 25 (April 27, 1789) (Joseph Gales ed., 1834). At the assembly, which was presided over by the newly appointed Chaplain of Congress, Washington, the entire Congress, and the rest of the assembly sang the prayer *Te Deum*, which includes many expressly Christian references. Stokes, *supra* at 485; Jeffry H. Morrison, *The Political Philosophy of George Washington* 156-57 (2009).[4]

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[4] The text of the *Te Deum* includes:

> We praise thee, O God : we acknowledge thee to be the Lord.
>
> * * *
>
> The holy Church throughout all the world: doth acknowledge thee.
>
> The Father : of an infinite Majesty.
>
> Thine honorable, true : and only Son.
>
> Also the holy Ghost : the Comforter.
>
> Thou art the King of glory : O Christ.
>
> Thou art the everlasting Son : of the Father.
>
> * * *
>
> We therefore pray thee help thy servants : whom thou hast redeemed with thy precious blood.
>
> * * *

The Book of Common Prayer 51 (1662 ed., reprinted Eyre & Spottiswoode, 1892). The *Te Deum* dates to the fourth century

John Adams followed the precedent set by Washington's inauguration. In a Thanksgiving proclamation issued March 23, 1798, President Adams asked for "His infinite grace, through the Redeemer of the World, freely to remit all our offenses, and to incline us by His Holy Spirit to that sincere repentance and reformation." A Proclamation by President John Adams (March 23, 1798), *in* 1 James D. Richardson, *A Compilation of the Messages and Papers of the Presidents* 269 (1902), H.R. Misc. Doc. No. 210 (1896).

Upon the death of George Washington in 1799, Major General Henry Lee III offered a prayer before both houses of Congress. Bird Wilson, *Memoir of the Life of the Right Reverend William White, D.D., Bishop of the Protestant Episcopal Church of the State of Pennsylvania* 351 (1839). Lee referred to Washington as "our beloved brother in Christ"; prayed that those present "may obtain unto the resurrection of life, through Jesus Christ our Lord"; and closed "through Jesus Christ our Lord." *Id.* at 351-52. And throughout much of this time period, faith-specific legislative prayers were also offered before Congress. While the text of these prayers were not recorded, the Senate Chaplain relayed in a personal letter the set formula that he followed for the prayers he offered during his tenure from 1790 to 1800. That formula included the Lord's Prayer, St. Chrysostom's Prayer, and thanksgiving for "the grace of the Lord Jesus Christ." Letter from Bishop William White to Reverend Henry D. Johns (Dec. 29, 1830), *reprinted in* Bird Wilson, *supra*, at 322.

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and has been part of the traditional daily office of prayers since then. F. Brittain, *Medieval Latin and Romance Lyric to A.D. 1300* 63 (Cambridge 2009) (1937).

3. Founding-era legislative prayer was also common at the municipal level. In New York, for example, the Anglican Church was formally disestablished in April 1777. N.Y Const. of 1777 art. XXXVIII. Yet in 1805, the New York City Council appointed a chaplain who served on behalf of the City's public institutions for some thirty years. Charles G. Sommers, *Memoir of the Rev. John Stanford, D.D.* 141 (1835). The City Council paid the chaplain $500 for his annual services. 18 Minutes of the Common Council of New York 1784—1831 590 (1917).

Similarly, during yellow fever outbreaks in 1803 and 1822, the New York City Council declared a city-wide day of prayer and recorded a written, faith-specific prayer offered by "a number of clergymen of different denominations of this City." 12 Minutes of the Common Council of New York 1784—1831, September 3, 1821 to March 31, 1823, 529 (City of New York 1917).

* * * * *

These surviving prayers are a powerful indication of what was understood to be permissible in legislative prayer at the time of the founding. Specifically, they suggest that the invocation of Christ and the use of other explicitly Christian themes were commonplace and uncontroversial. There is no evidence to suggest that such features were an anomaly. The logic of *Marsh*, in light of this historical record, compels the conclusion that the presence of expressly Christian language in a prayer cannot possibly, of its own force, disqualify the prayer as unconstitutional.[5]

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[5] Although there was very little opposition to legislative prayer at the founding, James Madison did express opposition to Congressional chaplaincies in an unpublished essay in the

B. Since the founding, faith-specific legislative prayer has remained a widespread and accepted practice.

Successive generations of Americans have continued to treat faith-specific legislative prayer as an important and accepted part of civil government.

1. When the Fourteenth Amendment was ratified in 1868, faith-specific legislative prayer was still commonplace. This is strong evidence that legislative prayer was unobjectionable when the Establishment Clause was incorporated against the states. *See Heller*, 554 U.S. at 614 (understanding of the Fourteenth Amendment generation is "instructive" in interpreting the Bill of Rights). This time period is also signifi-

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1820s—over thirty years after voting to authorize paid chaplains. *Marsh*, 463 U.S. at 787 n.8, 791 n.12. But as Justice Brennan pointed out, "These arguments were advanced long after * * * the adoption of the Establishment Clause. They represent at most an extreme view of church-state relations, which Madison himself may have reached only late in life. He certainly expressed no such understanding of Establishment during the debates on the First Amendment. And even if he privately held these views at that time, there is no evidence that they were shared by others among the Framers and Ratifiers of the Bill of Rights." *Walz* v. *Tax Comm'n of City of New York*, 397 U.S. 664, 684 n.5 (1970) (Brennan, J., concurring) (citations omitted). Beyond that, Madison's objections were based on the fact that chaplains were "to be paid out of the national taxes," and that only chaplains of "the major sects" would be selected—neither of which is true here. Elizabeth Fleet, Madison's 'Detatched Memoranda,' 3 Wm. & Mary Q. 534, 558 (1946). Finally, the same essay objects to "tax exemptions for churches, the incorporation of ecclesiastical bodies[,] * * * the provision of chaplains in the Army and Navy, and presidential proclamations of days of thanksgiving or prayer"—all of which have long been upheld as uncontroversial. *Walz*, 397 U.S. at 684 n.5 (Brennan, J., concurring).

cant because prayers before legislatures were not officially recorded by congressional record-keepers until the 1860s, and even then they were not recorded regularly. Among the prayers that made it into the record, two of the earliest ones are in the Congressional Globe from July 4, 1861. The Senate Chaplain prayed that God's "Church and Kingdom may flourish" for "Jesus Christ's sake." Cong. Globe, 37th Cong, 1st Sess. 1 (1861). The House Chaplain concluded his prayer with a recitation of the Lord's Prayer. *Id.* at 2.

A few small collections of state legislative prayers from the same time period have also been published. Two sets of prayers from the Massachusetts legislature—100 prayers from 1868 and fifty prayers in 1892—reveal similar faith-specific prayer tendencies. According to *Amicus Curiae*'s review, the Unitarian minister referred to either Jesus Christ or the Bible in at least 42% of the prayers in 1868, while in 1892, 70% of the prayers by a Congregational minister referred to either Christ or the Bible. *See* William R. Alger, *Prayers Offered in the Massachusetts House of Representatives During the Session of 1868* (1868); Daniel Wingate Waldron, *The Chaplain's Prayers* (1892).

2. During and after Reconstruction, legislative prayer was also common in municipalities. In 1895, for instance, Philadelphia hired a chaplain for the City Council. 2 Journal of the Common Council of the City of Philadelphia from October 2, 1895, to April 2, 1896 53 (1896). Similarly, in 1877, the Mayor of Boston invited a chaplain to pray before a city-wide celebration. Oration Delivered Before The City Council and Citizens of Boston on the One Hundred and First Anniversary of the Declaration of American Independence, July 4, 1877, 5 (Order of the City Council

1879). When the texts of these prayers were recorded, they were almost invariably faith-specific. A typical example is the prayer of Rev. Joshua P. Bodfish, rector of the Roman Catholic Cathedral, which he delivered in 1879 before the Boston City Council: "We pray Thee, O Almighty and Eternal God! who, through Jesus Christ, hast revealed Thy glory to all nations, to preserve the works of Thy mercy * * * ." Oration Delivered Before The City Council and Citizens of Boston at 7 (1879).

3. The practice and funding of faith-specific legislative prayer have continued from the time of Reconstruction until today. Congress first regularly recorded legislative prayers after the turn of the century, around 1910. A five-year sample of those recorded prayers displayed a consistent pattern of faith-specific language: of 1,052 congressional prayers recorded between 1910 and 1914, 94% refer to Jesus Christ, the Bible, or both.[6]

Municipalities during this timeframe were no different. In one example, during a joint meeting of Boston's City Council and Board of Aldermen in 1909, the city chaplain offered a prayer with multiple biblical references: "Almighty God, our Heavenly Father, we lift our hearts in thankfulness to Thee [.] * * * And to [God] we will give the praise and honor, dominion and power, for He is the source of all power, world without end. Amen." Reports of Proceedings of

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[6] More data on these prayers, including the text of many of the prayers, is available in *Atheists of Florida, Inc.*, v. *City of Lakeland, Florida*, No. 12-11613 (11th Cir.), Brief *Amicus Curiae* of The Becket Fund for Religious Liberty, 13-22 (filed June 25, 2012), *available at* http://www.becketfund.org/wp-content/uploads/2013/07/Lakeland-Amicus.pdf.

the City Council of Boston For The Year Commencing January 1, 1909 and Ending February 5, 1910, 1 (City of Boston Printing Department 1910) (referring to *Matthew* 5:14, *Jude* 1:25, *Ephesians* 3:21, and *Psalm* 91:6).

That pattern of faith-specific prayers has persisted in recent years as well. A review of the prayers in Congress from 2009 through 2012 reveals that 62% used expressly Christian language, referring to "Christ," "Jesus," or the Christian New Testament.[7]

* * * * *

The historical record of legislative prayer in this country shows that faith-specific prayers were commonplace. Indeed, it is difficult to find examples of founding-era prayers that were *not* faith-specific. Accordingly, the ultimate result of the lower court's holding—banning or chilling "sectarian" prayers—cannot be reconciled with the binding authority of *Marsh* and the plain historical record.

II. Legislative prayer is neither an establishment as originally understood, nor an establishment as recognized by this Court.

Given the unambiguous history of legislative prayer at the founding, it is obvious that the Found-

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[7] *Amicus* reviewed all 1,197 publicly available prayers recorded in Congress from 2009 through 2012. 743 of them contained explicit Christian references. For example, the House of Representatives Chaplain, Rev. Patrick Conroy, was a Jesuit and closed each of his prayers with the phrase "May all that is done this day be for Your greater honor and glory." This closing was a quote from *1 Timothy* 1:17 and the motto of the Jesuits, *ad majorem Dei gloriam*, or "for the greater glory of God." See, *e.g.*, 158 Cong. Rec. H7433 (2012).

ers did not view legislative prayer as "a step toward an established church." *Marsh*, 463 U.S. at 788 n.10. But *why* did the Founders not view legislative prayer as an establishment? To answer that question, it is essential to understand what the Founders understood as an establishment of religion. At the time of the founding, an establishment consisted of several well-defined practices centered on government coercion of religious belief or practice. Because legislative prayer does not involve any of these practices, the Founders did not view it as an establishment.

A. At the time of the founding, an establishment consisted of government control, government coercion, government funding, or assignment of government powers to church authorities.

The Founders knew establishments of religion well. They knew them from the centuries-old establishment in England, and they knew them from the established churches in nine of the thirteen colonies. And although these establishments often varied in their particulars, they all had one unifying feature in common: the use of government power to coerce religious belief or observance. See McConnell, 44 Wm. & Mary L. Rev. at 2131 ("[T]he key element of establishment" was state "control" of religious groups). At the time of the founding, the "essential * * * ingredients" of an establishment took one of four forms: (1) government financial support of the church, (2) government control of the doctrine and personnel of the church, (3) government coercion of religious beliefs and practices, and (4) government assignment of

important civil functions to church authorities. See *id.* at 2118, 2131.[8]

1. The first element of an establishment was public financial support of the church. This took many forms—from compulsory tithing, to direct grants from the public treasury, to specific taxes, to land grants. *Id.* at 2147. Land grants were the most significant form of public support. *Id.* They provided not only land for churches and parsonages, but also income-producing land that ministers used to supplement their income. *Id.* at 2148. Trinity Church in New York became the largest landowner in Manhattan through land grants, and still has millions of dollars worth of property in New York today. *Id.* at 2149. Similarly, Congress gave religious land grants as a part of its efforts to settle the Northwest Territory. *Id.* at 2150.

Notably, while public funding was part of most established churches, it was not a necessary feature. Established churches existed without access to public funds, as in South Carolina and (for a time) Virginia. *Id.* at 2112, 2157.

2. The second element of an establishment was state control over the institutional church. This control manifested itself in two ways that are startling to modern eyes: the control of religious doctrine and the appointment and removal of religious officials. *Id.* at 2132.

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[8] Professor McConnell lists six elements of establishment. We refer to three of those categories—"compulsory church attendance," "prohibitions on worship in dissenting churches," and "restriction of political participation," *ibid.*—using the shorthand "government coercion of religious beliefs and practices."

England set the standard for both. Parliament determined the articles of faith for the Church of England, approved the text of the Book of Common Prayer, made it doctrine that the King must be Supreme Governor of the Church, and mandated that all ministers accept the Church of England's doctrines. 1 William Blackstone, *Commentaries* 364-83; see also Thomas Berg, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 180 (2011). American colonies followed suit, with Anglican colonies like Virginia essentially importing England's rules, and the Puritan colonies in New England accomplishing a similar result through localized rules. McConnell, 44 Wm. & Mary L. Rev. at 2133, 2135. Several of these American establishments continued after the Revolution. *See, e.g.*, S.C. Const. of 1778 art. XXXVIII (establishing the "Christian Protestant religion" and allowing churches to incorporate only if they assented to five articles of faith).

England also set the standard for controlling the appointment of church officials, as is apparent from the title of its religious uniformity law: "An Act * * * for establishing the Form of Making, Ordaining, and Consecrating Bishops, Priests, and Deacons in the Church of England." Act of Uniformity, Public Act, 14 Charles II, c. 4 (1662). So pronounced was England's control over church officials that "[political] loyalty * * * exceeded spirituality as a qualification" for the job. McConnell, 44 Wm. & Mary L. Rev. at 2137. The colonies did not import England's practice wholesale—for instance, Jonathan Swift's bid to be appointed the Anglican Bishop of Virginia failed because the colonists pointedly ignored his proposed amendment. *Id.* at 2143. But the power of appoint-

ment and removal still ended up in government hands, albeit colonial ones, and that power still rendered religious groups "subservient" to their state masters. *Id.* at 2140. See also *Hosanna-Tabor*, 132 S. Ct. at 702-3 (describing government control over ministerial appointments during the colonial period). This control over who was appointed a minister was an element of establishment the Founders sought to avoid. *Id.* at 703 (citing 1 Annals of Cong. 730–731).

3. The third feature of establishment was the coercion of individuals' religious beliefs and practices. This took three main forms: compelled church attendance, prohibition on worship in dissenting churches, and exclusion of dissenters from political participation. McConnell, 44 Wm. & Mary L. Rev. at 2144, 2159, and 2176.

England fined those who failed to attend Church of England worship services, and the colonies followed the English lead. Virginia's earliest settlers attended twice-daily services on pain of losing daily rations, whipping, and six months of hard-labor imprisonment. George Brydon, *Virginia's Mother Church and the Political Conditions Under Which It Grew* app. 1 at 412 (1947). While Virginia eased those laws, versions of them remained in force until 1776. Sanford Cobb, *The Rise of Religious Liberty in America: A History* 521 (Burt Franklin 1970) (1902). Connecticut and Massachusetts also had similar laws in place until 1816 and 1833, respectively. See *Id.* at 513; Mass. Const. of 1780, art. III (stating that the government may "enjoin upon all" attendance at "public instructions in * * * religion").

The laws creating an establishment not only compelled attendance at the established church, but also

frequently banned attendance at dissenting churches. Under the guise of heresy laws, England targeted Puritans, Baptists, Presbyterians, and especially Catholics. McConnell, 44 Wm. & Mary L. Rev. at 2160-61. Massachusetts notoriously enacted similar provisions that, for a short time, it used to banish, whip, mutilate, and even hang some non-Puritans. *Id.* at 2162. Virginia imprisoned some thirty Baptist preachers between 1768 and 1775 because of their undesirable "evangelical enthusiasm," and horse-whipped others for the same offense. *Id.* at 2118, 2166. Several states simply banned Catholic churches altogether. *Id.* at 2166.

Finally, those who dissented from the established church faced restrictions on political participation. England set the example by allowing only Anglicans to hold public office; the states almost universally took comparable measures. *Id.* at 2177. Maryland's version of religious disqualification lasted until 52 years ago, when it was invalidated by this Court. *Torcaso* v. *Watkins*, 367 U.S. 488 (1961). In a rather American twist, almost all of the colonies placed religious restrictions on the right to vote. McConnell, 44 Wm. & Mary L. Rev. at 2177.

4. The last element of establishment was government assignment of important civil functions to church authorities. States used religious officials and entities for social welfare, elementary education, marriages, public records, and the prosecution of certain moral offenses. Thus, at certain points in state history, New York recognized only those teachers who were licensed by a church; Georgia ministers were tasked with keeping vital statistics; South Carolina recognized only marriages performed in the Anglican church; and Virginia churchwardens were duty-

bound to make presentments to the county court about misdemeanors such as profanity, Sabbath-breaking, and fornication. *Id.* at 2171-76.

In sum, an "establishment of religion" had a very specific meaning for the Founders. It consisted of government funding of the church, government control over doctrine and personnel of the church, government coercion of religious belief and practice, and government use of the state church to carry out civil functions. Laws imposing these elements created an established church. Laws that lacked these elements did not.

B. Legislative prayer does not fall within any recognized category of establishment.

The historical understanding of establishment not only explains the result in *Marsh* but also explains a large part of this Court's Establishment Clause jurisprudence. This Court has repeatedly recognized that there are potential Establishment Clause problems with government funding of religious entities, government control over religious doctrine, government coercion of religious practices, or government use of religious entities to carry out civil functions. But because legislative prayer involves none of these elements, it does not violate the Establishment Clause.

1. Legislative prayer does not constitute impermissible government funding.

The first element of establishment is government financial support of religion. This Court has repeatedly recognized that certain types of funding raise establishment concerns. In *Texas Monthly Inc.* v. *Bullock*, for example, the Court struck down a state law that provided a sales tax exemption for religious pub-

lications but not for secular publications. 489 U.S. 1 (1989). Similarly, in *Lemon*, the Court struck down funding of secular instruction in religious schools on the ground that the program would require "state inspection and evaluation of the religious content of a religious organization," and thus was "pregnant with dangers of excessive government direction of church schools and hence of churches." 403 U.S. at 620.

Here, however, there is no issue of funding, because all prayer givers were unpaid volunteers. Pet. Br. 21. In that sense, this case is even easier than *Marsh*, which involved a paid chaplain. *Ibid.*

Even in *Marsh*, however, the funding was not constitutionally problematic. As the Court pointed out, both Houses of the First Congress hired a paid chaplain to offer legislative prayers. *Marsh*, 463 U.S. at 787-88. This is because employment of a legislative chaplain is different in kind from government funding of ministers or religious teachers for the general public. A paid legislative chaplain serves the unique needs of legislators—much like paid military chaplains, prison chaplains, and hospital chaplains serve the unique needs of soldiers, prisoners, and hospital patients. In each case, the chaplain is not serving the general public or imposing religious practices on the rest of society; rather, the chaplain is accommodating the voluntary religious practices of government employees or wards of the state—without government coercion or control of religious practice. *Cutter* v. *Wilkinson*, 544 U.S. 709, 722 (2005) (comparing military chaplains and prison chaplains). In other words, a legislative chaplain is "a permissible legislative accommodation of religion"—not an establishment. *Id.* at 720.

Nor is there any concern here or in *Marsh* about discriminatory funding of religious practices. In *Marsh*, there was no evidence "that the chaplain's reappointment stemmed from an impermissible motive." 463 U.S. at 793-94. And here, not only is there no funding, but Respondents concede that prayer givers were chosen on a neutral basis. Pet. Br. at 3. Thus, there is no Establishment Clause problem.

2. Legislative prayer does not constitute government control over religious groups' practices.

The second element of establishment is government interference in the doctrine or governance of religious institutions. A prime example of this type of violation is *Hosanna-Tabor* v. *EEOC*, 132 S. Ct. 694 (2012). There, a religion teacher at a church school brought a retaliation claim against her former employer under the Americans with Disabilities Act. This Court held that for a court to overrule the church's decision about a ministerial employee would be to impermissibly interfere with a church's "ecclesiastical decisions." *Id.* at 706.

Similarly, in *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976), this Court overturned a state court's attempt to reinstate a defrocked bishop. The Court held that the state had "unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church." *Id.* at 720. In other words, in ecclesiastical matters, the government may not interfere with church decisions.

This element of establishment is completely absent here, as it was absent in *Marsh*. The practice of legislative prayer has no impact on church polity, internal church decisions, or church doctrine. It does not take sides in theological disputes or interfere with internal church governance. And it does not declare official state doctrine. Instead, it asks individual citizens to invoke their beliefs, whatever they may be, to solemnize the operations of government. To the extent that legislative prayer means that the government is "appointing ministers," *Hosanna-Tabor* 132 S. Ct. at 703, the government is appointing ministers to minister to itself. *Hosanna-Tabor* is specifically concerned with "government interference with a *church*'s ability to select *its own* ministers." *Id.* at 704 (emphasis added).

In the context of legislative prayer, the only risk of government control over religious doctrine is when the legislature seeks to "direct[ ] and control[ ] the content of the prayers." *Lee* v. *Weisman*, 505 U.S. 577, 588 (1992). Ironically, this is precisely what the lower court's decision would compel courts and legislatures to do—to police the content of prayers to ensure that they are not "sectarian." Such policing constitutes both a forbidden form of coercion and a forbidden intrusion into individual religious belief and practice. The only constitutional approach, and the one followed by Petitioner and *Marsh*, is to use a neutral process of selecting a chaplain and to make no attempt to dictate the content of the prayers.

3. Legislative prayer is not government coercion of private parties to engage in religious activity.

The Establishment Clause likewise forbids the government from coercing an individual to engage in religious practice contrary to her beliefs. In *Torcaso* v. *Watkins*, for example, this Court struck down perhaps the most obvious form of religious coercion: a law requiring individuals to declare a belief in the existence of God as a test for public office. 367 U.S. at 496. Similarly, in *Engel* v. *Vitale*, 370 U.S. 421, 424 (1962), *School District of Abington* v. *Schempp*, 374 U.S. 203 (1963), *Lee* v. *Weisman*, 505 U.S. 577 (1992), and *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000), this Court struck down religious exercises sponsored by public schools, on the ground that minor students would feel compelled to participate.

Legislative prayer, however, does not involve coerced religious practice. When a chaplain offers a legislative prayer, no individual is compelled to listen to, acknowledge, or participate in the prayer. As *Marsh* put it, the audience for legislative prayer is "presumably not readily susceptible to 'religious indoctrination' * * * or peer pressure." *Marsh*, 463 U.S. at 792 (citations omitted). The chaplain who says the prayer is not exercising authority over schoolchildren, and thus even if children hear a legislative prayer on a school visit to a legislative chamber, they are not being coerced. As for legislators themselves, they can be expected to know the difference between a ceremonial invocation and coerced religious exercise.[9]

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[9] Indeed, elected officials have often stated that they are in great need of prayer as they govern the country. In 1854, for

4. Legislative prayer does not impermissibly cede government powers to religious organizations.

The last element of establishment is the assignment of important civil functions to religious authorities. In *Larkin* v. *Grendel's Den Inc.*, 459 U.S. 116 (1982), for example, this Court struck down a state law giving religious organizations veto power over liquor licenses for third parties. Similarly, in *Board of Education of Kiryas Joel* v. *Grumet*, 512 U.S. 687, 689 (1994), the Court struck down the creation of a special school district for a religious enclave because it "grant[ed] political control to a religious group."

These cases stand for the same principle: Churches or other religious organizations should not be vested with exclusive government powers. *Marsh* and the practice of legislative prayer do not violate this principle. Legislative prayer does not task religious bodies with carrying out functions that properly belong to the State alone, such as issuing liquor licenses or exercising political control over school district boundaries. Instead the State invites a religious official—or as in this case, volunteer citizens—to solemnize government activities.

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example, the House Judiciary Committee rejected an argument that the Congressional chaplaincy violated the Establishment Clause, concluding: "[W]e submit, that there never was a deliberative body that so eminently needed the prayers of righteous men as the Congress of the United States." *See* Robert C. Byrd, *The Senate, 1789-1989* at 301 (vol. 2, 1982); *available at* http://www.senate.gov/artandhistory/history/resources/pdf/Chaplain.pdf.

C. Legislative prayer is an important acknowledgment of the founding-era political philosophy of limited government and inalienable rights.

Based on the historical record and the Founders' understanding of establishment, it is clear that the Founders did not view legislative prayer as constitutionally problematic. But that does not tell us why the Founders engaged in it or why they believed it was important. Further examination of history shows that the Founders viewed legislative prayer as a natural outflow of their political philosophy of limited government and inalienable, God-given rights.

As the Declaration of Independence explains, the Founders believed that all people are "endowed by their Creator with certain unalienable Rights," including "Life, Liberty and the pursuit of Happiness." The Declaration of Independence para. 2 (1776). "[T]o secure these rights, Governments are instituted among Men[.]" *Id.* In other words, the government does not create rights; it protects rights that are beyond the reach of government because they come from God.

Similarly, as James Madison, Alexander Hamilton, and Oliver Ellsworth wrote in an address for the Continental Congress: "[I]t has ever been the pride * * * of America, that the rights for which she contended were the rights of human nature. By the blessings of the Author of these rights on the means exerted for their defence, they have prevailed against all opposition, and form the basis of thirteen independent states." 1 *Elliot's Debates* 100 (1836). In other words, the Founders believed not only that rights

were God-given, but that their defense depended on "the blessing of the Author of these rights." *Ibid.*

The importance of this political philosophy has been recognized in cases upholding the inclusion of the words "under God" in Pledge of Allegiance. By stating that we are "one nation under God," the Pledge recognizes the founding ideals of limited government and inalienable rights. In *Newdow* v. *Rio Linda Union School District*, the Ninth Circuit acknowledged that "one nation under God" refers to "the belief that it is the people who should and do hold the power, not the government. [The Founders] believed that the people derive their most important rights, not from the government, but from God." 597 F.3d 1007, 1013 (9th Cir. 2010). Therefore the government's role is only to secure rights, not to grant rights. *Id.* at 1028. The use of "God" in the Pledge was therefore a "predominantly patriotic exercise." *Id.* at 1014.

Just as "the phrase 'one Nation under God' constitutes a powerful admission by the government of its own limitations" in the Pledge of Allegiance, *id.* at 1036, so too does legislative prayer constitute a powerful reminder to duly-elected government officials of the limits of their powers. "In a republic, where the people are self-governing, it was generally thought that coercion had to be replaced, or at least supplemented, with a regard to the public good." McConnell, 44 Wm. & Mary L. Rev. at 2195. Representatives had to "somehow be persuaded to submerge [their] personal wants into the greater good of the whole." Gordon Wood, The Creation of the American Republic 68 (1969).

Legislative prayer, by beginning the legislator's work with a call to service, serves this crucial purpose. Legislators at every level of government are frequently reminded that they are called to be public servants acting for the general welfare. Legislative prayers frequently take on this character, calling for an increase in virtues like wisdom, compassion, and humility, while warning against vices like selfishness or envy. *See, e.g.* 158 Cong. Rec. H695 (2012); 158 Cong. Rec. S1099 (2012); 158 Cong. Rec. H3173 (2012). Legislative prayer thus serves as a constant reminder of the Founders' political philosophy of limited government and God-given rights. To suppress legislative prayer is to suppress a vital reminder of those founding principles.

CONCLUSION

Under *Marsh*, this case is easy. But many cases in the lower courts are hard because the *Lemon* test and its "endorsement" corollary continue to be the predominant method of deciding Establishment Clause cases. The Court should therefore clarify that an historical method is the preferred way to decide Establishment Clause claims, and that lower courts should evaluate those claims in light of the elements of establishment recognized at the founding.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE, NEW YORK,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Brief of *Amici Curiae* Board of Commissioners for Carroll County, Maryland; Board of Commissioners for Cobb County, Georgia; Board of Commissioners for Rowan County, North Carolina; City of Lakeland, Florida; County Commission for Franklin County, Missouri; Forsyth County, North Carolina, Board of Commissioners; Hamilton County, Tennessee, Board of Commissioners, and The Franklin Select Board, Franklin, Vermont, Addressing the Merits in Support of Petitioner Town of Greece.

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INTEREST OF THE AMICI[1]

Amici curiae are local legislative bodies serving communities across the United States. They are Board of Commissioners for Carroll County, Maryland; Board of Commissioners for Cobb County, Georgia; Board of Commissioners for Rowan County, North Carolina; City of Lakeland, Florida; County Commission for Franklin County, Missouri; Forsyth County, North Carolina, Board of Commissioners; Hamilton County, Tennessee, Board of Commissioners and The Franklin Select Board, Franklin, Vermont. Each *amici* has or has had a practice of opening its meetings with legislative prayer, and each *amici* has had its prayer practice challenged on Establishment Clause grounds. An inconsistent patchwork of legal decisions has resulted from the application of *Allegheny*'s endorsement test, which has made it virtually impossible for *amici* to know whether a given prayer policy is constitutional without litigating each policy up through the federal court system. This is evidenced, for example, by *Galloway v. Town of Greece, New York*; as well as by *Joyner v. Forsyth County, North Carolina*, and *Pelphrey v. Cobb County, Georgia*---the latter two counties being *amici* on this brief where one county's prayer policy was

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[1] Counsel of record for all parties received timely notice of the *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

found constitutional (Cobb), while a virtually identical policy in the other county was deemed unconstitutional (Forsyth). *Amici*, therefore, have a direct interest in this case. They believe their years of experience with legislative prayers will aid this Court by providing an important and unique perspective on the Establishment Clause issues implicated by legislative prayer.

SUMMARY OF ARGUMENT

For the hundreds of local and state governments that participate in the longstanding history and tradition of starting their legislative meetings with prayer, the constitutionality of prayers that contain sectarian references is, to borrow a phrase from Justice Thomas, "anyone's guess." *Davenport v. American Atheists*, 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting from denial of cert.). Some circuit courts allow sectarian references, at least where the selection process for prayer-givers is neutral and generally available to all religious groups in the community. *Pelphrey v. Cobb Cnty, Ga.*, 547 F.3d 1263 (11th Cir. 2008); *Rubin v. City of Lancaster, Calif.*, 710 F.3d 1087 (9th Cir. 2013). Other circuits prohibit all sectarian references. *Hinrichs v. Bosma*, 440 F.3d 393, 399 (7th Cir. 2006), *dism'd on jurisdictional grounds sub nom Hinrichs v. Speaker of the House of Reps.*, 506 F.3d 584 (7th Cir. 2007) (concluding that *Allegheny* "read *Marsh* as precluding sectarian prayer"). Still others contend that some sectarian references are permissible, but not too many, because at some undefined point, recurring sectarian references constitute an Establishment Clause violation. *Joyner v. Forsyth*

Cnty, 653 F.3d 341 (4th Cir. 2011); *Galloway v. Town of Greece*, 681 F.3d 20, 33 (2d Cir. 2012) ("there is no substantive mixture of prayer language that will, on its own, necessarily avert the appearance of affiliation").[2]

Given this conflicting tapestry of cases, cities and counties truly must guess whether at the start of legislative meetings they are permitted to allow religious leaders to pray consistent with their own faith (which prayers might include sectarian references) or whether local governments must censor individual prayers to ensure that the invocations "embrace a non-sectarian ideal." *Joyner*, 653 F.3d at 347; *Stein v. Plainwell Cmty. Schs.*, 822 F.2d 1406, 1409 (6th Cir. 1987) (interpreting *Marsh v. Chambers*, 463 U.S. 783 (1983), as prohibiting prayers that go "beyond 'the American civil religion'"). Unfortunately, this uncertainty stems in large measure from conflicting Establishment Clause standards found in *Marsh* and *Cnty. of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). The lower courts' attempts to reconcile these cases have resulted in inconsistent holdings and widespread

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[2] The difficulty confronting local governments trying to follow our nation's deeply embedded history of legislative prayer is apparent from the Second Circuit's *Galloway* opinion. According to that court, its reasoning "def[ies] exact legal formulas" and is based on "the exercise of 'legal judgment.'" *Galloway*, 681 F.3d at 30. Given the subjective nature of its test, the court does "not aim to specify what the Establishment Clause allows." *Id.* at 33. As a result, local governments are left to their own devices to figure out what the Establishment Clause allows.

uncertainty as to the scope of public accommodation of religious beliefs permitted under the Establishment Clause.

In *Allegheny*, the majority sought to limit the scope of *Marsh* in response to Justice Kennedy's claim that *Marsh* legitimated all "practices with no greater potential for an establishment of religion" than those "accepted traditions dating back to the Founding." *Allegheny*, 492 U.S. at 669-70. Specifically, by interpreting *Marsh*, *Allegheny* sought to preclude legislative prayers "that have the effect of affiliating the government with any one specific faith or belief." *Id.* at 603. In so doing, *Allegheny* actually reintroduced the test that the dissent adopted in *Marsh*. Justice Brennan would have struck down Nebraska's prayer policy for the reason given in *Allegheny*—the prayers "explicitly link[ed] religious belief and observance to the power and prestige of the State." *Marsh*, 463 U.S. at 798 (Brennan, J., dissenting). But given that the majority in *Marsh* rejected this "explicitly linking" test, it necessarily also rejected an *Allegheny* "effect of affiliating" test. Instead of looking to see if a third party views the prayers as linking or affiliating government and religion, the *Marsh* majority upheld the legislative prayers because such facially religious government speech did not jeopardize "the principles of disestablishment and religious freedom" the Establishment Clause was meant to protect. *Marsh*, 463 U.S. at 786.

Because *Marsh* and *Allegheny* are at odds with each other, the legislative prayer cases, unlike *Lee v.*

Weisman, 505 U.S. 577 (1992),[3] "require [the Court] to revisit the difficult questions ... of the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs and practices of many of its citizens." *Id.* at 586. In particular, this Court must determine whether an *Allegheny* "effect of affiliating" test or the Establishment Clause principles discussed in *Marsh* govern sectarian legislative prayers. As discussed more fully below, *Allegheny*'s endorsement test—whether a reasonable observer would view the prayers as having the effect of affiliating the government with religion—is inconsistent with *Marsh* and also with this Court's newly articulated government speech doctrine in *Summum*, which permits the government (not third parties) to determine the content of its own messages. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009); *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) ("Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.") (plurality opinion). Thus, this Court should reaffirm *Marsh* and, in the

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[3] In *Lee*, the majority did not have to address the scope of accommodation of religious belief under the Establishment Clause because of the unique coercive pressures at work in the school setting---"the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid." *Lee*, 505 U.S. at 598. Given the differences between the public school system and a legislative session, the same coercive pressures are not at work in the legislative context. As a result, the difficult questions remain and must be clarified so that *amici* and other local governments do not need to guess at the constitutionality of their prayer practices.

process, protect the right of legislative bodies to celebrate (in a non-proselytizing, non-coercive manner) the rich religious history in their communities and in our nation.

To be sure, neither *Marsh* nor *Summun* gives local governments unlimited authority to engage in facially religious speech. As *Summum* makes generally clear, "government speech must comport with the Establishment Clause." *Summum*, 555 U.S. at 468. Contrary to the Second Circuit's opinion in *Galloway*, however, the operative question is not whether "an ordinary, reasonable observer" would view the town as favoring or disfavoring religion. *Galloway*, 681 F.3d at 29. Rather, under *Marsh*, legislative prayers---both sectarian and nonsectarian---are permissible if they do not infringe on the "religious freedom" of those in attendance. *Marsh*, 463 U.S. at 786.

The central inquiry is whether the government has attempted to "exploit[]" the "prayer opportunity ... to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-95. Provided the prayers do not "coerce anyone to support or participate in any religion or its exercise" and do not "give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so,'" *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring and dissenting), then the Establishment Clause permits the government to accommodate the religious beliefs of its citizens through legislative prayer.

ARGUMENT

I. *Allegheny*'s "effect of affiliating" test is inconsistent with both the majority's reasoning in *Marsh* and this Court's government speech doctrine.

In *Galloway*, the Second Circuit holds that "the town's prayer practice must be viewed as an endorsement of a particular religious viewpoint." *Galloway v. Town of Greece*, 681 F.3d 20, 30 (2012). This is so, according to the court, because "an objective, reasonable person would believe that the town's prayer practice had the effect of affiliating the town with Christianity." *Id.* at 33. Although mentioning *Marsh v. Chambers*, 463 U.S. 783 (1983), throughout its opinion, the Second Circuit's reasoning in *Galloway*, is squarely rooted in *Cnty of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). An "effect of affiliating" test from *Allegheny*, however, is incompatible with the majority opinion in *Marsh*, which rejected the dissent's similar "explicitly linking" test, and also with this Court's government speech doctrine. By confirming that *Marsh*, not *Allegheny*, governs legislative prayers, this Court will clarify the proper scope of public accommodation of religious beliefs under the Establishment Clause and reconcile this Court's Establishment Clause jurisprudence with its government speech doctrine.

A. *Marsh* governs the constitutionality of sectarian and nonsectarian legislative prayers, not an *Allegheny* "effect of affiliating" test, which was developed in the entirely different context of holiday displays.

Marsh broke with the then-dominant Establishment Clause test, declining the invitation to apply *Lemon v. Kurtzman*, 403 U.S. 602 (1971). While not discussing *Lemon*, the majority in *Marsh* was fully aware of the dissent's claim, echoed by the Second Circuit in *Galloway*, that legislative prayers had the impermissible effect of affiliating government with religion. In particular, the dissent concluded that legislative prayers are "clearly religious" and that "invocations in Nebraska's legislative halls *explicitly link* religious belief and observance to the power and prestige of the State." *Marsh*, 463 U.S. at 798 (Brennan, J., dissenting) (emphasis added). The dissent, therefore, had no problem deciding that Nebraska's prayer policy, pursuant to which the state paid the same Presbyterian minister to open sessions of the legislature with prayer for 16 years, was unconstitutional.

In contrast, the majority in *Marsh* rejected the dissent's "explicitly linking" test in favor of its broader understanding of the scope of public accommodation permitted for religious expression under the Establishment Clause. But the *Marsh* dissent's "expressly linking" test is the same as the "effect of affiliating" test that *Allegheny* championed and that *Galloway* applied to the prayers given at

board meetings in the Town of Greece. Under both tests, "an objective, reasonable person would believe that the town's prayer practice had the effect of affiliating the town with Christianity." *Galloway*, 681 F.3d at 32.[4] Having rejected the dissent's "explicitly linking" test, however, *Marsh* is also incompatible with an "effect of affiliating" test upon which *Allegheny* and the Second Circuit relied.

The fact that *Allegheny* was decided after *Marsh* does not mean *Allegheny* supplanted *Marsh*'s Establishment Clause analysis. Indeed, the majority in *Allegheny* discussed *Marsh* at some length---(i) in the context of holiday displays, which involved neither legislative prayers nor government speech,[5] and (ii) through the lens of the endorsement test. Under *Allegheny*, courts decide whether there is an Establishment Clause violation by looking to the effect of government speech on a third-party observer. "The effect of the display depends upon the message that the government's practice communicates: the question is 'what viewers may fairly understand to be the purpose of the display.'" *Allegheny*, 492 U.S. at 595 (*quoting Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J.,

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[4] *See also Marsh*, 463 U.S. at 798 (Brennan, J., dissenting) ("More importantly, invocations in Nebraska's legislative halls explicitly link religious belief and observance to the power and prestige of the State. 'The mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred.'") (*quoting Larkin v. Grendel's Den*, 459 U.S. 116, 125-26 (1982)).

[5] *Allegheny*, 492 U.S. at 600 ("On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own.").

concurring)). Applying this same reasoning, the Second Circuit concluded that a hypothetical reasonable observer would think that the Town's prayer practice had the effect of affiliating the town with Christianity. *Galloway*, 691 F.3d at 33.

The problem is that dicta in *Allegheny*, even dicta that has influenced some lower courts, cannot overrule this Court's prior holding in *Marsh*. *See, e.g., Allegheny*, 492 U.S. at 668 ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law") (Kennedy, J., concurring and dissenting); *Central Va. Community College v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated."). *Marsh* did not consider the effect of legislative prayers on third party listeners. Instead, *Marsh* focused on whether the government intended to exploit the prayer opportunity to proselytize or advance a particular faith and actually rejected the dissent's claim that the focus should be on the listener. Accordingly, *Allegheny* and *Galloway* applied the wrong Establishment Clause test in the context of legislative prayers. *Marsh* provides the proper lens through which to evaluate the constitutionality of legislative prayers.

B. This Court should reject an *Allegheny* "effect of affiliating" test because that test is irreconcilable with the government speech doctrine, which applies to legislative prayers.

While the Second Circuit suggested that the Town's legislative prayers were government speech,[6] it failed to consider, let alone discuss, how this Court's "recently minted government speech doctrine" might affect its analysis. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 481 (2009) (Souter, J., concurring). Even though *Allegheny* admitted that the government was not "communicating a message of its own," 492 U.S. at 601, the Second Circuit applied an *Allegheny* "effect of affiliating" test to facially religious government speech instead of using the principles articulated in *Marsh* and *Summum*.

The problem is that an "effect of affiliating" test undermines the "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). By predicating the constitutionality of facially religious government speech on the effect it has on a reasonable observer, *Allegheny* causes the government to forfeit its right "to select the views that it wants to express." *Summum*, 555 U.S. at 468. Instead of celebrating "what [government officials] view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture," *id.* at

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[6] The Second Circuit noted that "it is relevant, and worthy of weight, that most prayer-givers appeared to speak on behalf of the town and its residents," that the people giving the prayers "spoke in the first-person plural," and that "Town officials ... contributed to the impression that these prayer-givers spoke on the town's behalf." *Galloway*, 681 F.3d at 32.

472, local governments like Town of Greece are required to censor (or possibly prohibit) sectarian legislative prayers to make sure a reasonable observer would not view them as affiliating the government with a specific religious sect.

In *Summum*, the Court considered whether Pleasant Grove City could refuse to display in a park a monument containing the Seven Aphorisms of the Summum religion when it already displayed a monument inscribed with the Ten Commandments. In holding that the City could accept some monuments (even facially religious monuments) while rejecting others, the Court confirmed that the government "has the right 'to speak for itself'" and that, when speaking, the government "'is entitled to say what it wishes'" and "to select the views that it wants to express." *Summum*, 555 U.S. at 467-8 (internal quotations and citations omitted). Stated differently, "the government's own speech ... is exempt from First Amendment [speech] scrutiny." *Id.* (*quoting Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 553 (2005)). When speaking, the government can discriminate based on content and viewpoint to insure that its message gets out without being distorted.[7]

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[7] In *Marsh*, the Nebraska legislature discriminated based on content (allowing facially religious speech but not other types of speech at the start of legislative sessions) and possibly viewpoint (retaining the same Presbyterian minister to give the prayers for 16 years and not hiring other religious leaders to give the prayers). Because there was no "proof that the chaplain's reappointment stemmed from an impermissible motive," Nebraska's favoring of a Presbyterian viewpoint "did

To qualify for the protection afforded by the government speech doctrine, the government must "effectively control[]" the message and have "final approval authority" over the selection of that message. *Summum*, 555 U.S. at 473 (*quoting Johanns*, 544 U.S. at 560-61). Given that the government decided which monuments "it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the park," the message about its image was government speech. *Summum*, 555 U.S. at 473. Having assumed the role of speaker, the government could claim the fundamental right protected by the Speech Clause—the right to choose the content of its message. "[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573.

As in *Marsh* and *Lee*, prayers given at the start of legislative meetings, such as the board meetings in *Galloway*, are government speech. In *Marsh*, the Nebraska Legislature started each session with a prayer offered by a minister who was selected and paid by the state government. The government had complete control over the legislative sessions, including who could speak and when. Although the Legislature did not dictate the content of Reverend Palmer's prayers, it retained the ability to do away with the prayer practice altogether or to employ others to deliver the prayers. As a result, *Marsh* realized that legislative prayer is a form of

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not conflict with the Establishment Clause." *Marsh*, 463 U.S. at 793-94.

government-sponsored religious speech that is subject to, but does not violate, the Establishment Clause.

Similarly, in *Lee v. Weisman*, 505 U.S. 577 (1992), the Court determined that graduation prayer is government speech—a "state-sanctioned religious exercise"—because in the context of a high school graduation "teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students." *Id.* at 597. While there are important differences between high school graduations and legislative meetings for Establishment Clause purposes,[8] the government retains a high degree of control over the location, timing, agenda, speakers, and decorum of both events. As the Second Circuit noted in *Galloway*, the prayer-givers spoke on behalf of the Town and its residents, used the first-person plural, and were frequently acknowledged as "our chaplain of the month." *Galloway*, 681 F.3d at 32.[9] In addition, the Town Board called the monthly public meetings, set the agenda, conducted each meeting,

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[8] *Lee*, 505 U.S. at 596 ("Inherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh v. Chambers*").

[9] Given that *Marsh* upheld Nebraska's retaining the same Presbyterian minister for 16 years, the fact that Town of Greece recognized the prayer-givers as "our chaplain of the month" does not create an Establishment Clause problem. Rather, in the context of legislative prayer, it reinforces that the government was adopting as its own the speech of the volunteer who gave the prayer just as the prayers of the paid chaplain in *Marsh* were the prayers of the Nebraska Legislature.

and established the procedures used for selecting the prayer-givers who gave each invocation. Accordingly, consistent with *Marsh* and *Lee*, legislative prayers are government speech.

Summum's government speech doctrine, that government has a right to determine its own message, limits how courts should evaluate the constitutionality of facially religious government speech such as legislative prayers. As evidenced by *Marsh*, the government's intended message (*e.g.*, to solemnize the legislative session or to "harmonize with the tenets of some or all religions," *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)) may differ significantly from how others interpret that message. For example, the *Marsh* dissent interpreted the prayers as sending a message that the government was officially promoting religion. *Marsh*, 463 U.S. at 798 (Brennan, J., dissenting). For the Nebraska Legislature and the majority, the prayers were simply "a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792.

That different (reasonable) people will interpret the government's message differently is understandable. While the government controls its intended message by selecting only speech that "present[s] the image of the City that it wishes to project to all who frequent the [meetings]," *Summum*, 555 U.S. at 473, the government cannot control how others interpret a prayer, a monument, or any other government speech. After all, government speech, such as the Ten Commandments monument in *Summum*, is not limited to

"convey[ing] only one 'message.'" *Id.* at 474; *Salazar v. Buono*, 559 U.S. 700 (2010) ("[A] Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people."). Those who hear a prayer at the start of a legislative session may interpret that speech activity in various ways. "Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." *Summum*, 555 U.S. at 474. *See also Lee*, 505 U.S. at 597 ("People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation.").

Reasonable people—Representative Chambers and the dissenters in *Marsh*—interpreted the Nebraska prayers as an establishment of religion, but that did not decide the Establishment Clause question. Instead, the majority looked at "historical evidence" to discern "what the draftsmen intended the Establishment Clause to mean." *Marsh*, 463 U.S. at 790. Based on the "unambiguous and unbroken history of more than 200 years," the Court concluded that legislative prayer "presents no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations." *Id.* at 791 (internal citations omitted).

The fact that third parties might ascribe different meanings to government speech does not change the fact that the government intended a specific message. "[I]t frequently is not possible to identify a single 'message' that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor." *Summum*, 555 U.S. at 476. And it is the government's *intended* message that is relevant when deciding whether government speech violates the Establishment Clause. Under *Marsh*, the question is whether the government sought to exploit the prayer opportunity to proselytize or advance a particular faith or belief, not how a reasonable observer might interpret the government's speech activity. *See, e.g.*, *Summum*, 555 U.S. at 483 (Scalia, J., concurring) (explaining that the Ten Commandments monument was government speech but did not violate the Establishment Clause "because the Ten Commandments 'have an undeniable historical meaning' in addition to their 'religious significance.'") (*quoting Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (plurality opinion)).

Stated differently, an "effect of affiliating" test, speech as understood by a reasonable observer, does not apply to facially religious government speech because, if a court required the government to convey only those messages a reasonable observer would view as neutral towards religion, the government would lose the "right to 'speak for itself.'" *Summum*, 555 U.S. at 467 (*quoting Bd. of*

Regents of Univ. of Wis. System v. Southworth, 629 U.S. 217, 299 (2000)). Instead of "say[ing] what it wishes," government is forced to filter its speech to account for how a reasonable observer might interpret the message. *See, e.g.*, *Galloway*, 681 F.3d at 33 ("What we do hold is that a legislative prayer practice that, however well-intentioned, conveys to a reasonable objective observer under the totality of the circumstances an official affiliation with a particular religion violates the clear command of the Establishment Clause."). This is true even though, as *Summum* warns, such an observer may interpret the message differently from what the government intended. "These text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers....." *Summum*, 555 U.S. at 475. Moreover, relying on a reasonable observer's interpretation would have required Nebraska's legislature to review and edit Reverend Palmer's prayers, which, in turn, would have violated the Establishment Clause by driving the government into the prayer-writing business. "It is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people....'" *Lee*, 505 U.S. at 588 (*quoting Engel v. Vitale*, 370 U.S. 421, 425 (1962)).

The Second Circuit's reliance on an *Allegheny* "effect of affiliating" test is misplaced because it focuses on the wrong person in the communication process—the observer instead of the speaker. Rather than analyze what is critical in the government speech context—the government's intended message—the endorsement test considers the

message a reasonable observer, aware of the history and context, would attribute to the government. The endorsement test, therefore, presupposes a premise that *Summum* rejects---that the government's message is determined by the meaning others attribute to the government. *See Allegheny*, 492 U.S. at 599 (looking at the "effect of the crèche [or other religious display] on those who viewed it"); *Galloway*, 681 F.3d at 33 (considering whether a "reasonable person would believe that the town's prayer practice had the effect of affiliating the town with Christianity."). Under *Summum*, the government engages in speech activity "because it wishes to convey some thought or instill some feeling in those who see" or hear the speech. *Summum*, 555 U.S. at 470. Since an *Allegheny* "effect of affiliating" test deprives the government of its ability to control its message, this Court should reaffirm *Marsh*, not follow *Allegheny*.

II. Legislative prayers, whether sectarian or nonsectarian, are constitutional provided that government officials do not exploit the prayer opportunity to proselytize or to coerce participation in the prayers.

The fact that legislative prayers are government speech does not remove all constitutional limits on such prayers. As the Court instructs in *Summum*, "government speech must comport with the Establishment Clause." *Summum*, 555 U.S. at 468.[10]

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[10] Any government official or entity engaging in facially religious government speech also "is ultimately accountable to the electorate and the political process for its advocacy. If the

Any interpretation of the Establishment Clause must, in turn, "comport[] with what history reveals was the contemporaneous understanding of its guarantees." *Lynch*, 465 U.S. at 673. As a result, it is not surprising that *Marsh* relied on "the unambiguous and unbroken history of more than 200 years" when evaluating whether legislative prayers violated the First Amendment. Based on this history, *Marsh* concluded that legislative prayers are consistent "with the principles of disestablishment and religious freedom" protected by the Establishment Clause. *Marsh*, 463 U.S. at 792, 786.

Contrary to the dissent in *Marsh* and the majority's view in *Allegheny*, *Marsh* was not a narrow opinion that carved out a limited historical exception to Establishment Clause jurisprudence.[11] *Marsh* looked at the historical evidence to "shed[] light ... on what the draftsmen intended the Establishment Clause to mean," and "on how they thought that Clause applied to the practice authorized by the First Congress." *Marsh*, 463 U.S. at 790. As the Court stated, "their actions reveal their intent." *Id.*

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citizenry objects, newly elected officials later could espouse some different or contrary position.'" *Summum*, 555 U.S. at 468-69 (internal citations and quotations omitted).

[11] For a more detailed explanation of why *Marsh* is not a limited exception, *see* SCOTT W. GAYLORD, WHEN THE EXCEPTION BECOMES THE RULE: MARSH AND SECTARIAN LEGISLATIVE PRAYER POST-*SUMMUM*, 79 CIN. L. REV. 1017 (2011).

Based on the longstanding and important role of religion in the public sphere, *Marsh* concluded that the purpose of the Establishment Clause was to protect "religious freedom." 463 U.S. at 786.[12] Our American history illustrates that the government does not violate religious freedom by engaging in a broad array of facially religious speech (from hiring chaplains, starting legislative sessions with prayer, and requesting days of national prayer to Thanksgiving Proclamations and "God save the

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[12] That the central purpose of the Establishment Clause was to protect religious freedom by precluding government coercion is apparent from this Court's prior cases. *See McGowan*, 366 U.S. at 441 (noting that James Madison, who was the architect of the First Amendment, "'apprehended the meaning of the [Religion clauses] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.'") (*quoting* 1 Annals of Congress 730 (1789)); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding that the Religion Clauses "forestal[l] compulsion by law of the acceptance of any creed or the practice of any form of worship."). In *Engel v. Vitale*, the Court asserted that "[t]he Establishment clause, unlike the Free Exercise clause, does not depend upon any showing of direct governmental compulsion." *Engel*, 370 U.S. at 430. The Court cited no authority to support this claim, and its discussion was dicta given that there was compulsion in that case. "This is not to say, of course, that [school prayers] do not involve coercion..... When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Id.* at 430-31. Consequently, *Engel* stands at most for the limited proposition that *direct* coercion is not necessary to show an Establishment Clause violation. *See* MICHAEL W. MCCONNELL, COERCION: THE LOST ELEMENT OF ESTABLISHMENT, 27 WM. & MARY L. REV. 933 (1986).

United States and this Honorable Court"). Provided the speech does not "coerce anyone to support or participate in any religion or its exercise; [or], in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so,'" *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring and dissenting) (*quoting Lynch*, 465 U.S. at 678), the principles of "disestablishment and religious freedom" are protected. *Marsh*, 463 U.S. at 786. *See also Lee*, 505 U.S. at 640 (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.") (emphasis in original). Thus, the central inquiry when deciding the constitutionality of facially religious speech is whether legislative prayers interfere with the "great object" of the Establishment Clause—"freedom to worship as one pleases without government interference or oppression." *Allegheny*, 492 U.S. at 660 (Kennedy, J., concurring and dissenting).

In the wake of *Marsh* and *Summum*, the facially religious nature of government speech---what the public sees (a Ten Commandments monument) and hears (legislative prayer)—does not create an Establishment Clause violation. *Van Orden*, 545 U.S. at 690 ("Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.") (plurality opinion). Under *Marsh*, the government has broad, though not unlimited, authority to accommodate religion in the public

sphere. In particular, *Marsh* emphasizes that a person challenging legislative prayers must show, not that the prayers have the effect of affiliating the government with religion (the dissent's rejected position), but that "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95. Provided the legislative prayers do not "direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing," the Establishment clause is not violated. *Allegheny*, 492 U.S. at 660 (Kennedy, J., concurring and dissenting).

Similarly, absent evidence of coercion or proselytizing, *Marsh* instructs that courts should not censor legislative prayers or force the government to meet a court-imposed orthodoxy because "it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." *Marsh*, 463 U.S. at 795. As the Court emphasized in *Lee*, "[t]he suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted." *Lee*, 505 U.S. at 590. Without any indication that the government is using the prayer opportunity to coerce religious observance or promote a particular faith, courts need not worry about the content (*i.e.*, the sectarian or nonsectarian nature) of the prayers. The Establishment Clause does "not prohibit practices [such as legislative prayer] which by any realistic measure create none of the dangers which it is designed to prevent." *Sch.*

Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring).

The Court's general presumption that legislative prayers do not proselytize, indoctrinate, or coerce participation in a religious exercise is reinforced by the setting in which the prayers take place. Unlike high school graduation in *Lee*, legislative meetings are not one-time events of preeminent importance in the lives of those who attend. Government meetings are directed at adults. Attendees are free to come and go during the invocations or at other time during the meeting. *Lee*, 505 U.S. at 597. Moreover, because most of those hearing the prayers are adults, "[p]assersby who disagree with the message conveyed by these [prayers] are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech." *Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring and dissenting). Although objectors may "take offense at all manner of religious ... messages," including legislative prayers, the Court acknowledges that outside the school context "to endure social isolation or even anger may be the price of conscience or nonconformity." *Lee*, 505 U.S. at 597-98. *See also Marsh*, 463 U.S. at 792 (finding that the prayers did not violate the Establishment Clause because, among other things, "the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination' or peer pressure.").

The Establishment Clause analysis is no different for legislative prayers that contain sectarian

references.[13] Provided the government does not "exploit[]" the "prayer opportunity ... to proselytize or advance any one ... faith or belief," courts should not consider the "content of the prayer." *Marsh*, 463 U.S. at 794-95. Absent evidence of exploitation, "it is not for [courts] to embark on sensitive evaluation or to parse the content of a particular prayer." *Id.* at 795.

For some, the use of denominational references for the divine may suggest the government is promoting a particular faith. But sectarian references by themselves do not promote religion over nonreligion any more than their nonsectarian counterparts. *See Allegheny*, 492 U.S. at 665 n.4 (Kennedy, J., concurring and dissenting) ("In the first place, of course, this purported distinction [between sectarian and nonsectarian] is utterly

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[13] *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means."); *Van Orden*, 545 U.S. at 688 n.8 (Rehnquist, C.J., plurality) ("In *Marsh*, the prayers were often explicitly Christian"); *Marsh*, 463 U.S. at 818 n. 38 (Brennan, J., dissenting) (noting that several state legislatures engaged in overtly sectarian legislative prayers); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 n.10 (10th Cir.1998) ("[T]he mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause. Rather, what is prohibited by the clause is a more aggressive form of advancement, *i.e.*, proselytization.") (*citing Marsh*, 463 U.S. at 794-95); *Newdow v. Bush*, 355 F. Supp.2d 265, 285 n. 23 (D.D.C. 2005) (recognizing that "the legislative prayers at the U.S. Congress are overtly sectarian").

inconsistent with the majority's belief that the Establishment Clause 'mean[s] no official preference even for religion over nonreligion.'"). Thus, without some indication that the prayers have been exploited to proselytize or to coerce religious observance, judges should not parse the content of prayers or count the number of sectarian references since a state prohibition on sectarian references would threaten to establish "an official or civic religion" that would violate the Establishment Clause. *Lee*, 505 U.S. at 590. Such state-imposed religious neutrality would threaten to produce "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring).

To be sure, *Marsh* realizes that some government official somewhere might try to exploit the prayer opportunity to proselytize or advance a particular religion. In an extreme case, a court might find that a prayer policy directly or indirectly coerces attendees to participate in a religious exercise. For instance, if government officials were to preclude individuals who do not stand or bow their heads during a prayer from speaking at meetings,[14] then the prayers might violate the Establishment Clause because the town officials used the prayer opportunity to proselytize or to coerce participation in violation of the religious liberty of attendees.

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[14] *See, e.g., Wynne v. Town of Great Falls, South Carolina*, 376 F.3d 292, 302 (4th Cir. 2004), where the town council (unlike the Board in *Galloway*) used legislative prayer "to advance its own religious view in preference to all others" by excluding the plaintiff from the political process and soliciting support for its specific sectarian practices from like-minded religious leaders.

But *Marsh* does not presume that the use of legislative prayer, even sectarian prayer, violates the Establishment Clause. This is consistent with *Summum*, where the Court refused to impute an impermissible religious message to the government without evidence that the government entity was actually intending to advance (or disparage) a particular religion.

> [A] painting of a religious scene may have been commissioned and painted to express religious thoughts and feelings. Even if the painting is donated to the museum by a patron who shares those thoughts and feelings, it does not follow that the museum, by displaying the painting, intends to convey or is perceived as conveying the same "message."

Summum, 555 U.S. at 476 n.5. Just as a public museum may accept and display a religious painting without violating the Establishment Clause, so *Marsh* holds that the government may engage in legislative prayer without impermissibly advancing religion. As *Marsh*, *Van Orden*, and *Salazar* demonstrate, the fact that the public is exposed to "sectarian" speech—be it legislative prayers from a specific religious tradition, a monument inscribed with a particular version of the Ten Commandments, or a solitary Roman cross on Sunrise Rock—is not dispositive. Rather, in each of these cases the Court considered the government's motivation and intent, upholding each in turn despite the dissenters' claims

that the facially religious speech had the effect of affiliating the government with religion.

Where, as in *Galloway*, a local government body opens the prayer opportunity to all faiths in the community to solemnize its meetings, thereby demonstrating respect for the diversity of religious beliefs among its citizens, there is no Establishment Clause violation even if some of the prayer-givers make sectarian references. *See Lee*, 505 U.S. at 638 (Scalia, J., dissenting) ("I may add, moreover, that maintaining respect for the religious observances of others is a fundamental civic virtue that government ... can and should cultivate"). Under such policies, there is no basis for concluding that government entities are using legislative prayers to proselytize, coerce, or indoctrinate. *See Galloway*, 681 F.3d at 32 ("We ascribe no religious animus to the town or its leaders."); *Joyner v. Forsyth Cnty*, 653 F.3d 341, 353 (2011) ("The Board is correct to observe that its policy is neutral."). In *Pelphrey v. Cobb Cnty, Ga.*, 547 F.3d 1263 (11th Cir. 2008), and *Joyner*, the government commissions sought to include a variety of speakers from diverse religious faiths in the community on a first-come, first-served basis.[15] The number of participants in any given year depended on a variety of factors, including the size, demographics, and number of different religious traditions represented in the community as well as the willingness of particular religious leaders to participate in the program. Such prayer policies do

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[15] Of course, under *Marsh*, such diversity is not required. Nebraska's legislature retained the same Presbyterian minister to serve as chaplain for 16 years.

not violate the Establishment Clause simply because representatives from a "Christian viewpoint" or some other religious viewpoint repeatedly give the invocation. *But see Galloway*, 681 F.3d at 30 (striking down the prayer policy because, among other things, "[t]he town's process for selecting prayer-givers virtually ensured a Christian viewpoint."). In *Marsh*, the prayer-giver did not reflect the religious beliefs of all Nebraskans. He was a Presbyterian minister who offered prayers from a Christian perspective for 16 years. Yet the Court did not see this as a "real threat" to religious freedom. *Marsh*, 463 U.S. at 795. *A fortiori*, a random selection process opening the prayer opportunity to all religious leaders in a community on a first-come, first-serve basis must also be consistent with Establishment Clause principles. If one faith constitutes the largest denomination in a community and many religious leaders of that same denomination volunteer, it is unremarkable that the majority of prayer-givers would be from that one faith.

> It is true that 82% of Cleveland's participating private schools are religious schools, but it is also true that 81% of private schools in Ohio are religious schools. To attribute constitutional significance to this figure, moreover, would lead to the absurd result that ... an identical private choice program might be constitutional in some States, such as Maine or Utah, where less than 45% of private schools are religious schools,

> but not in other States, such as Nebraska or Kansas, where over 90% of private schools are religious schools.

Zelman v. Simmons-Harris, 536 U.S. 639, 658 (2002) (in the context of school vouchers). The reasoning in *Galloway* leads to the same "absurd result" in the legislative prayer context.

Counties in Georgia and North Carolina had virtually identical prayer policies, yet the Eleventh Circuit upheld Georgia's policy while the Fourth Circuit struck down North Carolina's. Why the constitutional difference if both policies were equally open to all religious leaders in their respective communities? The Fourth Circuit, like the Second Circuit in *Galloway*, attributed constitutional significance to the differing demographics in the communities. Whereas in Cobb County, Georgia "leaders of all faiths had come forth," "[i]n practice, the [Forsyth County] Board's policy resulted in a greater proliferation of sectarian prayer ... [because] at no time after the adoption of the policy did a non-Christian religious leader come forth to give a prayer." *Joyner*, 653 F.3d at 352-53. *See also Galloway*, 681 F.3d at 31 ("The town fails to recognize that its residents may hold religious beliefs that are not represented by a place of worship within the town."). Under *Marsh* and *Zelman*, if the selection process is neutral, any disparity in the percentages of particular faiths participating in the prayer policy violates the Establishment Clause only

if the selection of prayer-givers "stemmed from an impermissible motive." *Marsh*, 463 U.S. at 793-94[16]

Under the neutral and inclusive selection process used by the Town of Greece and other local governments, there is no basis to ascribe an "impermissible motive" to government entities that allow prayer at the beginning of their meetings. Their policies are designed to encourage the participation of all faiths in the public life of the community. Even though the prayers might contain sectarian references, the government entities do not review the prayers to make sure they conform to some generic civic religion. *See, e.g.*, *Lee*, 505 U.S. at 588 ("It is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.'"); *Marsh*, 463 U.S. at 794-95 ("The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."); *Pelphrey*, 547 F.3d at 1274 ("The taxpayers

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[16] Just as the Cleveland officials did not create the disparity in parochial and secular private schools in *Zelman*, government officials do not control the religious demographics of their communities. The fact that some religious groups may not want to participate or that some denominations provide the prayer on more than one occasion does not change the analysis. *See Joyner*, 653 F.3d at 363 (Judge Niemeyer dissenting) ("The frequency of Christian prayer was, rather, the product of demographics and the choices of the religious leaders who responded out of their own initiative to the County's invitation.").

would have us parse legislative prayers for sectarian references even when the practice of legislative prayers has been far more inclusive than the practice upheld in *Marsh*. We decline this role of 'ecclesiastical arbiter,' ... for it 'would achieve a particularly perverse result.'") (internal citations omitted).

Accordingly, absent evidence of the government exploiting the prayer opportunity to proselytize or advance a particular religion, sectarian and nonsectarian legislative prayers are permissible under the Establishment Clause because they do "not coerce anyone to support or participate in any religion or its exercise," *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring and dissenting). Additionally, they serve as "a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792.

CONCLUSION

Allegheny's analysis of legislative prayers has fostered widespread confusion among the lower courts, leading to contradictory results even when reviewing virtually identical prayer policies. *Compare Pelphrey*, 547 F.3d 1263 and *Joyner*, 653 F.3d 341. The problem is that *Allegheny* seeks to reintroduce an "effect of affiliating" test, which *Marsh* rejected, without overturning *Marsh* itself. Whereas *Allegheny* focuses on whether a reasonable observer would view legislative prayers as having the effect of affiliating the government with a particular religion, *Marsh* announces a different Establishment Clause standard for legislative

prayers based on the intent of the government speaker—whether "the prayer opportunity has been exploited to proselytize or advance any one ... faith or belief." *Marsh*, 463 U.S. at 794-95.

The *Marsh* standard, not *Allegheny*, is consistent with the Establishment Clause. It recognizes the diversity of faiths in the community without censoring or dictating the content of prayers. To the extent that some in attendance do not share the particular faith perspective of a prayer-giver, they can sit quietly during the prayer, leave the room, peaceably protest, or stand out of respect for the views of others in the community, as Sam Adams did in 1774 when he said "he was no bigot, and could hear a prayer from [any] gentleman of piety and virtue, who was at the same time a friend to his country." *Marsh*, 463 U.S. at 792. *See also Lee*, 505 U.S. at 597-98 ("We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity."); *Allegheny*, 492 U.S. at 664 ("Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech."). What dissenters cannot do is to preclude government officials from participating in the longstanding "acknowledgment of beliefs widely held among the people of this country." *Marsh*. 463 U.S. at 792.

Amici are very sincerely seeking guidance from this Court. The Court should reaffirm that *Marsh* provides the proper Establishment Clause standard in the context of legislative prayers and should

expressly reject *Allegheny*'s "effect of affiliating" test. Absent evidence that a government entity is intending to exploit the prayer opportunity to proselytize or coerce religious participation, courts should allow local communities to participate in the "unambiguous and unbroken history" of legislative prayer that "has become part of the fabric of our society." *Id.* To do otherwise would violate the Establishment Clause by forcing courts to become ecclesiastical arbiters for the nation.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-696

In The Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY and LINDA STEPHENS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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INTEREST OF *AMICI CURIAE*[1]

Gerard V. Bradley has been a Professor of Law at the University of Notre Dame since 1992, before which time he taught at the University of Illinois College of Law.[2] At Notre Dame, he has taught courses in various areas of Constitutional Law, including the law of the First Amendment. Bradley serves as Co-Director of the Natural Law Institute, and as Co-Editor-in-Chief of *The American Journal of Jurisprudence*, an international forum for legal philosophy published in partnership with Oxford University Press. Bradley is a Senior Fellow at the Witherspoon Institute in Princeton, New Jersey. He has been a Visiting Fellow at the Hoover Institution of Stanford University and a Visiting Professor of Politics at Princeton University. In 2012, Cambridge University Press published his edited collection, *Challenges to Religious Liberty in the Twenty-First Century*. His most recent book is *Unquiet Americans: U.S. Catholics and the Genuine Common Good*, to be published in late 2013. For many years, Bradley served as

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[1] Counsel of record for the parties in this case have consented to the filing of *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

[2] The views expressed by Bradley and the other *amici curiae* herein do not necessarily reflect the views of their respective institutions.

President of the Fellowship of Catholic Scholars, and as Chair of the Federalist Society's Religious Liberties Practice Group.

The remaining eight *amici curiae* (listed in the attached Appendix) are also constitutional law scholars, who, along with Bradley, share the view that this Court in *Marsh v. Chambers* rightly affirmed legislative prayer as a practice deeply rooted in our nation's longstanding constitutional tradition, and that the *Lemon*-based "endorsement" test applied by the court of appeals is entirely inapposite to legislative prayer, requiring reversal of the decision below.

SUMMARY OF ARGUMENT

Legislative prayer, a practice upheld by this Court in *Marsh v. Chambers*, is deeply rooted in our constitutional tradition. As Justice William O. Douglas, writing for the Court in *Zorach v. Clauson*, famously observed, "We are a religious people whose institutions presuppose a Supreme Being." 343 U.S. 306, 313 (1952). The truth of this statement has been reflected in the public acknowledgement of God by all the branches of our government from the time of our founding through the present day.

In view of these historical practices, this Court held in *Marsh* that legislative prayer is sanctioned by the Establishment Clause, noting, in particular, that choosing a clergyman of a single denomination to serve as the chaplain for a public body does not

advance the beliefs of a particular church. *Marsh v. Chambers*, 463 U.S. 783, 793-94 (1983). Moreover, legislative prayer is by definition the invocation of "Divine guidance on a public body entrusted with making the laws." *Id.* at 792. The holding affirms that a government-sponsored prayer to a personal, benevolent, and providential "Supreme Being" – a common, but certainly not universally held concept of the Divine – is, nonetheless, a "tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792.

Moreover, unless there is an indication that the public body exploited the prayer opportunity to proselytize or to disparage other faiths – and this Court recognized that legislative opening prayers have not been viewed historically as a proselytizing activity – courts are not to concern themselves with the content of the prayers. *See id.* at 791-95. It is, of course, a natural consequence of allowing the practice of legislative prayer that prayer-givers will pray in terms that express the convictions of their own faith. The fact that the prayer-givers in the Town of Greece, a largely Christian community, mostly prayed in Christian terms is, therefore, neither remarkable nor incompatible with *Marsh*.

Despite the clear-cut holdings of *Marsh*, courts of appeals, including the court below, have applied the *Lemon*-based "endorsement" test (or some variation of it) to the practice of legislative prayer and, in so doing, have reached results that directly contradict *Marsh*. Given what legislative prayer *is*, however – as

recognized by this Court in *Marsh* – the *Lemon*/endorsement test is intrinsically and necessarily inapposite.

For one, legislative prayer – which by definition petitions God for guidance and assistance – has an indisputably religious purpose and is, therefore, necessarily incompatible with the "secular purpose" prong of the *Lemon*/endorsement test. For the same reason, the broad concept of neutrality implicit in the *Lemon*/endorsement test that government may not favor religion over nonreligion is inapplicable to legislative prayer (for the practice of petitioning a Divine entity has no "nonreligious" counterpart). In addition, the *Lemon*/endorsement test's "reasonable observer" standard clouds the proper focus of a legislative prayer analysis, which is to be on the public body's *practice*, not on any single *prayer*. In the context of a continuing government practice, a reasonable observer cannot be reasonable unless she has observed all of the events that make up the particular practice – which is rarely, if ever, the case in reality. Finally, the *Lemon*/endorsement test's mandate against the communication of messages that make nonadherents feel like "outsiders" cannot be satisfied in the context of legislative prayer absent the public body carefully scripting a universalized, amorphous "common prayer" to be delivered by the prayer-givers. Such scripting would itself likely violate the Establishment Clause, and would certainly violate the clear command of *Marsh* that, absent improper exploitation, judges are not to concern themselves with the content of prayers.

For all of these reasons, to apply the *Lemon*/endorsement test to legislative prayer is simply to overrule *Marsh v. Chambers*.

To be sure, in applying the *Lemon*/endorsement test to legislative prayer, the Second Circuit in the decision below (and the Fourth Circuit in *Joyner v. Forsyth County, North Carolina*) undermined, indeed effectively "overruled," *Marsh*. Neither court found that the public body had an impermissible motive in selecting prayer-givers, but both courts – troubled by the preponderance of Christian clergy that resulted from the public bodies' neutral selection processes – held that the Establishment Clause requires a diversity of religious speakers. *See Galloway v. Town of Greece*, 681 F.3d 20, 30-31 (2d Cir. 2012); *Joyner v. Forsyth Cnty., N.C.*, 653 F.3d 341, 354 (4th Cir. 2011), *cert. denied*, 132 S.Ct. 1097 (2012). Similarly, despite finding no evidence of exploitation of the prayer opportunity, both courts "embark[ed] on a sensitive evaluation" (*see Marsh*, 463 U.S. at 796) of the content of particular prayers. The prayers' distinct Christian references in both cases, the courts held, made non-Christians feel like outsiders. *See Galloway*, 681 F.3d at 31-32, 34; *Joyner*, 653 F.3d at 354-55. Perhaps most troubling of all was the Second Circuit's suggestion that prayer-givers must refrain from conveying their own views of religious truth when they pray (*see Galloway*, 681 F.3d at 34), an instruction that censors religious believers' speech and promotes a meaningless, court-created civil religion.

Finally, this Brief contends that this Court was correct in *Marsh* to recognize the inapplicability of the *Lemon*/endorsement test to the practice of legislative prayer. That being said, praying public bodies are not free to disregard other norms of constitutional limitation. Those public bodies may look to *Marsh* itself for those limiting principles to ensure the absence of an impermissible motive or improper exploitation, while at the same time allowing prayer-givers, in our time-honored tradition, to pray according to their consciences as informed by the tenets of their own religions.

ARGUMENT

I. LEGISLATIVE PRAYER IS A PRACTICE DEEPLY ROOTED IN OUR CONSTITUTIONAL TRADITION AND EXPRESSES AMERICANS' CONVICTION THAT WE ARE "ONE NATION, UNDER GOD"

Opening deliberative public assemblies, including legislative meetings, with prayer has been a conspicuous part of our experiment in democratic self-government since the founding. It is now practically an indelible feature of our civic life. Legislative prayer carries into practice Americans' beliefs that our nation stands "under God." Lawmakers at the national, state, and local levels thus naturally begin their work as our representatives by seeking Divine guidance and assistance.

In fact, throughout our history *all* the branches of government have habitually acknowledged the blessings of God upon our country, and sought Divine assistance with the challenges of governing. United States presidents, for example, have regularly marked the inauguration of their political service "with a request for divine blessing." *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 671 (1989) (Kennedy, J., concurring in judgment in part, dissenting in part).

Thomas Jefferson stated at his second inauguration:

> I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measures that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations.

Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), http://www.bartleby.com/124/pres17.html (last visited July 29, 2013).

John Adams declared during his inaugural address:

> [W]ith humble reverence, I feel it to be my duty to add, if a veneration for the religion of a people who profess and call themselves Christians, and a fixed resolution to consider a decent respect for Christianity among the best recommendations for the public service, can enable me in any degree to comply with your wishes, it shall be my strenuous endeavor that this sagacious injunction of the two Houses shall not be without effect. . . .
>
> And may that Being who is supreme over all, the Patron of Order, the Fountain of Justice, and the Protector in all ages of the world of virtuous liberty, continue His blessing upon this nation and its Government and give it all possible success and duration consistent with the ends of His providence.

John Adams, Inaugural Address (Mar. 4, 1797), http://www.bartleby.com/124/pres15.html (last visited July 29, 2013).

Presidents have often issued religious proclamations and executive orders, and both presidents and Congress have delivered other official announcements to "proclaim[] both Christmas and Thanksgiving National Holidays in religious terms." *See Lynch v. Donnelly*, 465 U.S. 668, 676 (1984) (O'Connor, J., concurring). Beginning with President Washington and followed by most of his successors, "American Presidents have issued Thanksgiving Proclamations

establishing a national day of celebration and prayer." *Allegheny*, 492 U.S. at 671 (Kennedy, J., concurring in judgment in part, dissenting in part). President Franklin D. Roosevelt "went so far as to 'suggest a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas' so that 'we may bear more earnest witness to our gratitude to Almighty God.'" *Id.* (citing Presidential Proclamation No. 2629, 58 Stat. 1160).

Many generations of Americans have perpetuated this early practice of giving thanks to the Divine Being within the context of petitionary prayer, all the way down to the present moment. This Court's own sessions begin with an unusually concise recognition of, and prayer for guidance to, a Provident Supreme Being: "God save the United States and this honorable Court." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring); *see also Allegheny*, 492 U.S. at 672 (Kennedy, J., concurring in judgment in part, dissenting in part).

II. IN *MARSH V. CHAMBERS*, THE COURT RELIED UPON CONSTITUTIONAL TRADITION AND HISTORICAL PRACTICE TO DECLARE THAT LEGISLATIVE PRAYER IS SANCTIONED BY THE ESTABLISHMENT CLAUSE

These many illustrations of our country's tradition of government prayer are compelling evidence of what the Establishment Clause means today. This Court has often declared that our country's historical

traditions must inform our understanding of the Establishment Clause,[3] especially when it comes to affirmations of religion on public property or within government settings.[4] The guiding force of history and tradition lay at the heart of *Marsh v. Chambers*, where the Court upheld Nebraska's longstanding practice of opening its state legislative sessions with prayer. *See Marsh*, 463 U.S. at 786-92. As Chief Justice Burger said in *Marsh*, "[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress – their actions reveal their intent." *Id.* at 790.

This Court has sometimes referred more specifically to actions of the First Congress as authoritative gloss upon the Constitution. "In the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it

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[3] *See, e.g., Walz v. Tax Comm'n*, 397 U.S. 664, 671-73, 680 (1970) (analyzing property tax exemptions for religious organizations in light of "more than a century of . . . history and uninterrupted practice").

[4] Interpretation of the Establishment Clause must "comport[ ] with what history reveals was the contemporaneous understanding of its guarantees." *See Lynch*, 465 U.S. at 673 (O'Connor, J., concurring) (crèche on public property); *Allegheny*, 492 U.S. at 669-70 (Kennedy, J., concurring in judgment in part and dissenting in part) ("A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.") (crèche in courthouse).

enacted legislation providing for paid chaplains for the House and Senate." *Lynch*, 465 U.S. at 674 (O'Connor, J., concurring). On the same day that the Bill of Rights was approved, "the House resolved to request the President to set aside a Thanksgiving Day to acknowledge 'the many signal favors of Almighty God.'" *Marsh*, 463 U.S. at 790 n.9 (citing J. of the H.R. 123).

In *Marsh*, the Court validated the legislative prayer practice of the Nebraska Legislature, which began each of its sessions with a prayer offered by Chaplain Rev. Dr. Robert E. Palmer, a Presbyterian minister, who was paid out of public funds and who had served as the Legislature's chaplain for a period of sixteen years. *See Marsh*, 463 U.S. at 784-85. In view of the country's historical traditions, the Justices in *Marsh* held that, absent an impermissible motive on the part of the Legislature, "[w]e no more than Members of the Congresses of this century, can perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church." *Marsh*, 463 U.S. at 793.

The *Marsh* Court specifically noted that, in the course of debates regarding whether or not to begin the first session of the Continental Congress with a prayer, Samuel Adams responded to an objection that the delegates were too divided on matters of religion to "join in the same act of worship," by stating that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country." *Marsh*, 463 U.S. at

791-92 (quoting Charles Francis Adams, *Familiar Letters of John Adams and His Wife, Abigail Adams, During the Revolution* 37-38, reprinted in Stokes, at 449). This Court concluded that the "interchange emphasizes that the delegates *did not consider opening prayers as a proselytizing activity* or as symbolically placing the government's 'official seal of approval on one religious view[.]'" *Id.* at 792 (emphasis added). The exchange further shows that prayer can be joined with patriotism to promote political unity, even among people who disagree in matters of religion.

III. ACCORDING TO *MARSH*, THE ESTABLISHMENT CLAUSE SANCTIONS A PRACTICE WHICH, TAKEN AS A WHOLE, ENDORSES CERTAIN BASIC PROPOSITIONS CONCERNING GOD AND HUMAN AFFAIRS

The prayers offered by Rev. Palmer in *Marsh* were squarely within the constitutional tradition described in the first two sections of this Brief. He directed these prayers to a Divine Being and implored God to guide the assembly's deliberations. The *Marsh* Court upheld this practice. The Court did *not* say or imply that it upheld some hallowed verbal formulae as the mechanism for getting legislators' attention and for causing them to get down to business – as if the "prayers" constitutionally validated in *Marsh* were merely an alternative to sounding a gong. Nor did the Court say or imply that the prayers in

Nebraska were one tolerable way to "solemnize" the occasion – as if the "prayers" were an alternative to a moment of silence or to reading Walt Whitman.

The *Marsh* Court instead affirmed the constitutionality of *precisely* "invok[ing] Divine guidance on a public body entrusted with making the laws." *Marsh*, 463 U.S. at 792. Justice Brennan quoted Rev. Palmer's description of the prayers' purpose in his (Brennan's) *Marsh* dissenting opinion: "'I strive to relate the Senators and their helpers to the divine. . . . [,] to provide an opportunity for Senators to be drawn closer to their understanding of God as they understand God. In order that the divine wisdom might be theirs as they conduct their business for the day.'" *Marsh*, 463 U.S. at 797-98, n.4 (Brennan, J., dissenting) (quoting Palmer Deposition, at 28, 46).

The prayers sanctioned by the *Marsh* Court did not amount to some spiritual Esperanto or religious least common denominator. These prayers affirmed or presupposed a set of common but hardly universally held propositions, namely, that there (i) is a Supreme Being, who (ii) has a continuing interest in human affairs; (iii) possesses the power to affect the course of human affairs; (iv) is benevolent (for the legislators assembled are obviously seeking some *good* effect by and through their prayer); and (v) actually listens and responds to people when they pray.

Many people do not hold beliefs such as these. Non-believers of course reject all such claims. Even some religious people deny or doubt some of them.

More than a few Founding Fathers, for example, have been described as Deists. Deists affirm the existence of a Creator God. But they characteristically deny Divine Providence; that is, they profess belief in a "clockmaker" God who at the beginning of time set in motion a course of events which includes human affairs, but who remains forever after aloof from them. Deists of this description would not affirm the efficacy of prayers for God's guidance in deciding what people should do about ordering earthly matters.

Buddhists are "Deists" in this one sense. Although Buddhism is a blend of ancient traditions and practices, Buddhists characteristically do not believe in a Creator God who remains interested in "guiding" or "assisting" human political affairs. *See* Rupert Gethin, *The Foundations of Buddhism* 65-66 (Oxford University Press 1998). Buddhists would thus characteristically eschew the types of prayers upheld in *Marsh*.

Jehovah's Witnesses are well-known to students of constitutional religious liberty, having served as plaintiffs in so many important Supreme Court cases. Jehovah's Witnesses are not Deists. They typically affirm, however, that God's undivided sovereignty over the whole universe renders human government so presumptuous as to be almost blasphemous. This is the theological basis for Jehovah's Witnesses' famous refusal to salute the American flag. Given these beliefs, Jehovah's Witnesses are not likely candidates to seek Divine assistance to a legislative assembly.

Wicca – a religion represented by the priestess who offered an invocation at a Town of Greece Board meeting (*see Galloway*, 681 F.3d at 23) – is an eclectic blend of beliefs and traditions, with origins and continued influence supplied by witchcraft. The dominant form of belief among Wiccans is pantheistic; Wicca is perhaps most accurately described as a "nature" religion with certain magical elements. In any event, the possibility of a prayerful appeal to a personal Supreme Being for guidance in practical matters is practically unintelligible within this framework of thought.

Justice Scalia gave effective voice to much of what we are saying in this section about the inescapable underpinnings of governmental prayer, in his dissent in one of the 2005 Ten Commandments cases:

> If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word "God," or "the Almighty," one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. . . . Historical practices . . . demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion.

McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 893-94 (2005) (Scalia, J., dissenting).

This irreducibility of legislative prayer arises, not from any discrimination by public authorities, but rather by the inherent nature of the undertaking. The legislative prayer practice upheld by this Court in *Marsh v. Chambers* intrinsically and thus necessarily adopts – affirms, presupposes, makes no sense apart from – a nested set of beliefs which are not, and have never been, shared by all Americans – or even by all Americans who profess religious faith.

Public authorities who open their meetings with prayers therefore do not "discriminate" against marginalized or "outsider" religions, any more than a prison or public school, which prepares special meals for believers adhering to dietary restrictions (such as Muslims and Jews), "discriminates" against Christians, for example, who adhere to no such regimen.

IV. UNDER *MARSH*, THE ESTABLISHMENT CLAUSE DOES NOT REQUIRE A LEGISLATIVE PRAYER PRACTICE TO REFLECT AN IDEAL UNIVERSALISM

The Court in *Marsh v. Chambers* held that Nebraska's way of conducting legislative prayer was "a tolerable acknowledgement of beliefs widely held among the people of this country" and, in so doing, adopted and repeated the words of Justice William O. Douglas, who wrote for the Court in *Zorach v. Clauson* that "'[w]e are a religious people whose institutions presuppose a Supreme Being.'" 463 U.S. at 792 (quoting *Zorach*, 343 U.S. 306, 313 (1952)).

This terse statement in *Marsh* expresses the two main elements of the Court's holding in that case, namely, that a constitutionally valid legislative prayer practice would both affirm ("presuppose") some *basic* propositions about the Divine entity, and reflect more specific (or "sectarian") *particularities*, according to their prevalence in the relevant state or local community. Both sorts of statements are integral to the practice validated in *Marsh v. Chambers.*

In the preceding section we saw how the *basic* propositions distinguish legislative prayer from other sorts of ice-breakers (the gong), from devices to instigate recollection (Whitman's poetry), and even from other types of religious expression (among Wiccans or Buddhists, for example). The *Marsh* Court also faced and met objections rooted in misunderstandings – or rejections – of the *particularity* norm. To these we now turn.

One such objection had to with the assertion that the Nebraska prayers were drawn from "the Judeo-Christian tradition." *See Marsh*, 463 U.S. at 793. Indeed they were; the content of Rev. Palmer's prayers reflected his own faith. They contained "'frequent references to the Christian religion.'" *See Brief of Amicus Curiae Rev. Dr. Robert E. Palmer Supporting Petitioner* at 5-7, *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012) (No. 12-696) (citing plaintiff-petitioner's original complaint).

The *Marsh* Court was not scandalized by this particularity. It held that "[t]he content of the prayer

is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95. There was no such indication of exploitation in *Marsh*. In other words: *particularity* as such is constitutionally unremarkable. So the Court stated: "[I]t is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." *Id.* at 795.

Why was the *Marsh* Court not scandalized? Because, we submit, if the Constitution permits the longstanding tradition of opening legislative meetings with prayer, and it is permissible to invite individuals to offer the prayers, then it is unsurprising that the prayer-givers pray in terms that are personal to them and that express the convictions of their faith. "Prayer includes the invocation of the Divine Being according to the understanding of the religion, not the court." *Joyner*, 653 F.3d at 367 (Niemeyer, J., dissenting). Thus, "Whatever name is spoken, it is spoken by the religious leader in accord with the leader's religion to call on the Divine Being." *Id.*

The Second Circuit found in the instant case that "[a] substantial majority of the prayers in the record contained uniquely Christian language" and "[r]oughly two-thirds contained references to 'Jesus Christ,' 'Jesus,' 'Your Son,' or the 'Holy Spirit.'" *See Galloway*, 681 F.3d at 24. Virtually all religious congregations in the Town of Greece during the time of record were Christian. *Id.* In fact and as the Second Circuit noted,

Respondents Susan Galloway and Linda Stephens, who have lived in or near the Town for more than thirty years, both testified that they were unaware of any non-Christian places of worship in the Town. *See id.* Given the predominance of Christian churches, the fact that the prayer-givers who volunteered to pray at the Town Board's monthly public meetings were predominantly Christian and prayed in Christian terms is hardly remarkable. It is by no means incompatible with *Marsh*. It is instead a "tolerable acknowledgement" – or *reflection*, we would say – "of beliefs widely held among the people of this country."

V. THE *LEMON*/ENDORSEMENT TEST IS INAPPOSITE TO LEGISLATIVE PRAYER

Courts often say that the practice of legislative prayer constitutes an exception to the *Lemon*/endorsement test. *See, e.g., Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 829 (11th Cir. 1989) ("*Marsh* created an exception to the *Lemon* test. . . ."); *Card v. City of Everett*, 520 F.3d 1009, 1014 (9th Cir. 2008) ("*Marsh* is a narrow opinion that should be construed as carving out an exception to normal Establishment Clause jurisprudence."). Legislative prayer as described and upheld in *Marsh* does not support this way of speaking. There is no basis in *Marsh* for speaking of an "exception" to the *Lemon*/endorsement test, if what is meant by that term is that it might be theoretically possible to apply that test to legislative prayer and get more or less plausible, coherent results, but that for extrinsic reasons the test is to be

put aside on this occasion. It is plainly the case that, given what legislative prayer *is* (as described and upheld in *Marsh*), the *Lemon*/endorsement test is intrinsically and necessarily inapposite.

The *Lemon*/endorsement test inquires (1) whether a particular government action has the actual purpose of endorsing religion or (2) whether it creates the perception of endorsement to a "reasonable" or "objective" observer who is familiar with the text, legislative history, and implementation of the law in question. *See Allegheny*, 492 U.S. at 592-94, 620 (Kennedy, J., concurring in judgment in part, dissenting in part) (modifying the three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which held that a particular government action violates the Establishment Clause unless (1) it has a secular purpose; (2) the principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement with religion); *see also Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

With its focus on the reasonable observer, the *Lemon*/endorsement test implicitly requires the government to maintain an appearance of neutrality toward religion. *See McCreary*, 545 U.S. at 860 ("The touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.") (citation and internal quotation marks omitted). If the challenged government action has the purpose or effect of favoring religion, it "sends

the . . . message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members. . . ." *Id.* (citation and internal quotation marks omitted).

What is the relevance of all this to the practice of legislative prayer, and to *Marsh v. Chambers*?

A. Legislative Prayer Necessarily Has A Religious Purpose

It is correct to say that, in one sense, the "purpose" of legislative prayer is the welfare of the political community. After all, legislators pray for God's help in making wise and just decisions about our common life. But this temporal benefit is sought by and through an activity – petitions for Divine guidance and assistance – which makes no sense apart from a religious purpose. It has been argued that legislative prayer serves the "secular purposes of 'solemnizing public occasions' and 'expressing confidence in the future'" (*see Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring in part and concurring in the judgment)) (citation omitted), but that argument misses the point.

The purpose of legislative prayer in *Marsh* was to seek "Divine guidance." This irreducibly religious aim is incompatible with the first prong of the *Lemon*/endorsement test. To apply this test to legislative prayer is simply to overrule *Marsh v. Chambers*, and

thereby to eradicate a practice cherished by Americans since the founding.

It is worth noting that, in applying the endorsement test to legislative prayer practices, both the Second Circuit and the Fourth Circuit inappropriately attributed secular purposes to legislative prayer. *See Joyner*, 653 F.3d at 342 (Niemeyer, J., dissenting) ("[I]n order to survive constitutional scrutiny, invocations must consist of the type of non-sectarian prayers that solemnize the legislative task and seek to unite rather than divide."); *Galloway*, 681 F.3d at 32 (requiring the town to explain to observers that it intended the prayers "to solemnize Board meetings"). *Marsh*, however, makes clear that the purpose of legislative prayer – to seek Divine guidance for the legislature – is distinctly religious. *See* 463 U.S. at 792. *Marsh* makes no mention of legislative prayer solemnizing the occasion or uniting the listeners because the Court there did not concern itself with whether legislative prayer has a secular purpose.

There are any number of equally effective ways to solemnize the legislative session – such as reading a patriotic message, or offering a moment of silence to reflect on the obligations and privileges of serving in a representative government – that would be devoid of any religious purpose. Furthermore, while it may well be that legislative prayer can serve as an "express[ion] of confidence in the future," that is not because it is secular. Seeking Divine guidance does not express confidence in the future absent an underlying religious belief that seeking such guidance will be

fruitful, i.e., that the hearer of the prayer is a God who listens and has the desire and power to influence human affairs.

B. The Concept Of "Neutrality" Underlying The *Lemon*/Endorsement Test Makes No Sense Of Legislative Prayer

The *Lemon*/endorsement framework is itself shaped by a broad concept of "neutrality," first embraced by the Court in *Everson v. Board of Education*, 330 U.S. 1 (1946), and often affirmed since, according to which government may not favor religion over what the Court calls "nonreligion." It is impossible, however, for legislative prayer – a practice which "coexisted with the principles of disestablishment"[5] – to satisfy this demand. Appeal to a Divine entity for guidance and assistance has no "nonreligious" counterpart. It is not that legislative prayer is to be preferred to some secular alternative. There is no secular alternative. It is not that legislators select prayer from a class of possible religious and non-religious ways of asking for God's help. There is no such class. There is no "neutrality" between belief and unbelief to be violated, because none is available. To apply the "endorsement" test to legislative prayer is therefore simply to overrule *Marsh v. Chambers*.

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[5] *Marsh*, 463 U.S. at 786.

C. Legislative Prayer Does Not Comport With The *Lemon*/Endorsement Test, Because That Test Cannot Apply To A Continuing And Perhaps Long-Time Government Practice With The Same Force As It May Apply To A Single Act Or Display

The *Lemon*/endorsement test's reasonable observer standard is prone to producing inconsistent results, especially when applied to a government practice or series of events like legislative prayer, as opposed to a single government act or display. For an observer can only be reasonable if he or she has observed all of the events that make up the particular government practice. For example, in a case involving roadside memorial crosses honoring fallen state troopers, the reasonable observer envisioned by a panel of the Tenth Circuit would be "driving by *one* of the memorial crosses [along a public highway] at 55-plus miles per hour." *American Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1160 (10th Cir. 2010) (emphasis added). That observer, therefore, would only see the "conspicuous" imprimatur of the state highway patrol on a religious symbol, but would not notice the biographical information of the fallen trooper suggesting that the cross served the secular purpose of standing as a memorial. *Id.* The dissenters' reasonable observer, on the other hand, would have seen all thirteen of the roadside crosses, including four on side streets with lower speed limits, and thus would have seen the "secularizing details" of the memorials. *American Atheists, Inc. v. Davenport*, 637 F.3d 1095,

1108-09 (10th Cir. 2010) (Gorsuch, J., dissenting from denial of rehearing en banc).

The same tension exists in the case of legislative prayer. The focus of the inquiry in *Marsh* was clearly on the Nebraska Legislature's prayer *practice*, not on any single prayer. *See Marsh*, 463 U.S. at 784 (noting that the issue was whether the Legislature's "*practice* of opening each legislative day with a prayer" violated the Establishment Clause); *id.* at 785 ("[Petitioner] claim[s] that the . . . Legislature's chaplaincy *practice* violates the Establishment Clause); *id.* at 786 ("[T]he [court of appeals] held that the chaplaincy *practice* violated all three elements of the [*Lemon*] test"); *id.* at 792 ("[T]he *practice* of opening legislative sessions with prayer has become part of the fabric of our society."); *id.* at 793 ("[T]hese factors do not serve to invalidate Nebraska's *practice*.") (all emphases added). The *Lemon*/endorsement test's "reasonable observer" standard only clouds this distinction.[6]

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[6] *See Joyner*, 653 F.3d at 354 (4th Cir. 2011) (applying the endorsement test and stating "citizens attending Board meetings hear the prayers, not the policy"); *cf.*, *id.* at 358, 364 (Niemeyer, J., dissenting) (criticizing majority's parsing of individual prayers and noting the distinction between focusing on particular "legislative invocations, not the policy governing the prayers").

D. Applying The *Lemon*/Endorsement Test To Legislative Prayer Could Itself Lead To An Unconstitutional Result

The *Lemon*/endorsement test is also inapplicable to legislative prayer because of the test's mandate against the communication of messages by the government that make nonadherents feel like "outsiders." *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). The only way to accomplish this goal and at the same time to allow prayer before legislative sessions would be for the public body to script a "nonsectarian," "endorsement"-inoculated common prayer to be delivered at each meeting.[7]

To apply this standard to legislative prayer would not only reverse *Marsh*. It would probably itself

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[7] Indeed, as Justice Kennedy has observed:

> [T]he very nature of the endorsement test, with its emphasis on the feelings of the objective observer, easily lends itself to [an inquiry into the minority or majority status of a religion in analyzing whether government recognition constitutes an endorsement]. . . . Those religions enjoying the largest following must be consigned to the status of least-favored faiths so as to avoid any possible risk of offending members of minority religions. . . . Obsessive, implacable resistance to all but the most carefully scripted and secularized forms of accommodation requires this Court to act as a censor, issuing national decrees as to what is orthodox and what is not. What is orthodox, in this context, means what is secular. . . .

See Allegheny, 492 U.S. at 677-78 (Kennedy, J., concurring in judgment in part, dissenting in part).

violate the Establishment Clause. *See Engel v. Vitale*, 370 U.S. 421, 430 (1962) ("[The] government . . . is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity."); *see also West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion. . . ."). *Marsh* affirmed this principle in the face of the petitioner's argument that the prayers were impermissible because they were in the "Judeo-Christian tradition":

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

463 U.S. at 794-95. Because satisfaction of the *Lemon*/endorsement test would require an unconstitutional scripting of prayer content, the test is an unsuitable measure of the constitutionality of legislative prayer.

VI. COURTS APPLYING THE *LEMON*/ENDORSEMENT TEST HAVE UNDERMINED, IF NOT SILENTLY "OVERRULED," THIS COURT'S HOLDING IN *MARSH V. CHAMBERS*

The Second and Fourth Circuits have applied the endorsement test to reach holdings that the prayer-givers were not of sufficiently diverse religious backgrounds. In *Galloway*, the plaintiffs-appellants had "expressly abandoned the argument that the town intentionally discriminated against non-Christians in its selection of prayer-givers." 681 F.3d at 26. Moreover, the court ascribed "no religious animus to the town or its leaders" and found "no evidence" that the town would not have accepted "any and all volunteers who asked to give the prayer." *Id.* at 31, 32. Having thus found no evidence of an impermissible motive, the court inexplicably went on to find an Establishment Clause violation, at least in part, because of the "preponderance of Christian clergy" resulting from the town's selection process. *Id.* at 31.

In *Joyner*, the prayer practice of the Forsyth County Board of Commissioners clearly was crafted to ensure compliance with *Marsh*. The Board utilized a random process to invite clergy from every religious congregation in the community to schedule an appointment to deliver an invocation. *Joyner*, 653 F.3d at 343. The written invitation stated that (a) the opportunity to pray was voluntary; (b) the clergy were free to offer the invocation according to the dictates of their own consciences; (c) and, in order to "maintain a

spirit of respect and ecumenism, . . . the prayer opportunity [should] not be exploited as an effort to convert others to the particular faith of the invocational speaker, nor to disparage any faith or belief different than that of the invocational speaker." *Id.* After receiving a complaint by the would-be plaintiffs about some of the prayers, the Board formalized the policy to clarify further that the prayers were not intended to affiliate the Board with any particular religion. *Id.* at 344.

The Fourth Circuit held that the Board's policy was, indeed, neutral. *Id.* at 353. Despite the absence of an impermissible motive, however, the court invalidated the policy because, in the short time following the Board's adoption of the formal policy,[8] Christian clergy were the only leaders to come forth to give a prayer, and the policy, therefore, had the effect of "favor[ing] the majoritarian faith in the community." *Id.* at 354. In applying the endorsement test, the court required a diversity of religious speakers in complete contradiction of this Court's finding that appointment of a single Presbyterian chaplain for sixteen years did not violate the Establishment Clause.

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[8] The formal policy was adopted in May 2007, and the district court heard oral argument on the parties' summary judgment motions in October 2009. *Joyner v. Forsyth Cnty., N.C.*, No. 1:07CV243, 2009 WL 3787754, at *1 (M.D.N.C. Nov. 9, 2009). The district court appeared to limit its analysis to "prayers delivered under the Policy through December 2008." *Id.* at *1 n.1.

In addition to improperly requiring that prayer-givers represent a diversity of religious viewpoints, both the Second and Fourth Circuit required that prayer-givers limit the use of Christian terminology in their invocations. In *Marsh*, however, this Court rejected the argument that the prayer practice was unconstitutional because the prayers were in the Judeo-Christian tradition, holding instead that, absent an "indication that the prayer opportunity has been exploited to proselytize, or advance any one, or to disparage any other, faith or belief," the "content of the prayer is not of concern to judges." 463 U.S. at 794-95. As discussed, the Court's focus in *Marsh* was on the prayer *practice*, not the prayers offered by Rev. Palmer. Because the legislature's prayer practice was not rooted in an impermissible motive and had not been exploited to proselytize or disparage, it was not for the Court "to embark on a sensitive evaluation or to parse the content of a particular prayer." *Id.* at 795.

As Justice Stevens recognized in his dissenting opinion in *Marsh*, the prayers in the record were "clearly sectarian" (*id.* at 823-24 (Stevens, J., dissenting)), in the sense that they contained explicit references to Christianity. In particular, one prayer stated: "Father in heaven, the suffering and death of your son brought life to the whole world moving our hearts to praise your glory." *Id.* at 824 n.2 (citing App. 103-04). The prayer went on to reference "the wonder of Christ crucified," the "glorious resurrection," and the

"great event of our redemption." *Id.* (citing App. 103-04).

Upon examination of a record containing sixteen years' worth of such prayers, this Court emphasized that the *content* of legislative prayers was not relevant to whether the *practice* was constitutional. Because the Nebraska Legislature did not have an impermissible motive and did not exploit the prayer opportunity, its prayer practice was consistent with the long history of legislative prayer as a "tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792 (majority opinion).

Ignoring this Court's mandate not to embark on an evaluation of the content of legislative prayers, the Second and Fourth Circuits – focusing on the "effect" of the prayers on the reasonable observer – did exactly that. The court in *Joyner*, despite finding an absence of religious animus or intent to discriminate against non-Christians, went into a hypercritical analysis of the content of specific prayers offered by the community's various clergy members. In the court's estimation, these prayers were unconstitutional because they contained multiple references to Jesus Christ, closed with invocations to the name of Christ, and invoked specific tenets of the Christian faith. *Joyner*, 653 F.3d at 349-50 (Neimeyer, J., dissenting). Applying the exact inverse of this Court's analysis in *Marsh*, the Fourth Circuit used the content of the prayers to justify its finding that the Board's policy was an "advancement of one religion." *Id.* at 353.

The Second Circuit took the same approach in *Galloway*. The court noted that most of the prayers at issue "contained uniquely Christian references" and that the "steady drumbeat of often specifically sectarian Christian prayers" improperly associated the Town with Christianity.[9] *Galloway*, 681 F.3d at 31-32. Notably, and in direct contravention of *Marsh*, the court made this finding in spite of the fact that the prayers did *not* "preach conversion, threaten damnation to nonbelievers, [or] downgrade other faiths." *Id.* Moreover, even though there had been no proselytizing in roughly 130 invocations over an eleven-year period of time, the court was apparently very concerned about the possibility, warning that public bodies have "few means to forestall the prayer-giver who cannot resist the urge to proselytize." *Id.* at 34.

This statement demonstrates again an inappropriate focus on the individual prayers, and not the Town's prayer practice. *Marsh*'s command to avoid exploitation of the prayer opportunity was directed to the public body implementing the prayer practice. A single prayer-giver who cannot resist the urge to proselytize would not violate that command; the

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[9] Even so, the Second Circuit stated, "The sectarian nature of the prayers, we emphasize, was not inherently a problem." *Id.* at 31. If this is the case, then composing a prayer using universally acceptable phraseology (albeit impossible) cannot be what *makes* the prayer constitutionally acceptable.

public body's repeated invitations to that same prayer-giver likely would.[10]

What is even more disturbing than the Second and Fourth Circuit's evaluating and parsing the content of prayers is the nascent wariness of religion that seems to underlie the majority opinions. In particular, the Second Circuit went so far as to warn prayer-givers to "resist [the] temptation" to "convey their view of religious truth, and thereby run the risk of making others feel like outsiders." *Galloway*, 681 F.3d at 34. And the Fourth Circuit expressed the same sentiment, albeit less directly: "[T]he deep beliefs of the speaker afford only more reason to respect the profound convictions of the listener. Free religious exercise posits broad religious tolerance." *Joyner*, 653 F.3d at 355 (Neimeyer, J., dissenting).

While no one would disagree with the importance of respect and tolerance, especially in matters as personally defining as religious faith, what is alarming is the suggestion that the only way to display respect and tolerance for others' beliefs is for the prayer-giver to keep his own beliefs to himself. "Prayer includes the articulation of words addressed to the Divine

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[10] Furthermore, the public bodies at issue in both *Galloway* and *Joyner* utilized a random process to invite all local clergy to offer invocations. The fact that the majority of the prayers were Christian prayers was simply a by-product of the fact that Christianity is, by a long shot, the predominant religion in both the Town of Greece and Forsyth County. *See Galloway*, 681 F.3d at 24; *Joyner*, 653 F.3d at 356-57 (Neimeyer, J., dissenting).

Being *in accordance with the beliefs of the prayer-giver's religion*." *Id.* at 366 (emphasis added). Furthermore, every religious tradition – whether Christianity, Islam, Judaism, Hinduism, Buddhism, or any number of others – consists of a set of claims defining the particular religion's view of reality (i.e., *truth*) with regard to the great questions of life. Inviting religious believers into the public square, asking them to "pray," and then telling them to avoid suggesting that they are speaking the truth, from their hearts, as they understand that truth to be, only promotes an artificial dialogue, a phony "pluralism," and a meaningless civil, "court-shaped religion" (*id.*). To the many millions in our society for whom prayer is the "sacred dialogue between humankind and God" (*id.* at 356), this form of censorship would be such an affront that it would be better to abandon the charade altogether.

VII. PROPER EVALUATION OF THE CONSTITUTIONALITY OF LEGISLATIVE PRAYER DEPENDS UPON OTHER NORMS SUITED TO IT AS A DISTINCT PRACTICE, AS ARTICULATED IN *MARSH*

We have argued in this Brief that a public body cannot look to the main prevailing Establishment Clause "tests" of constitutionality, any more than this Court in *Marsh v. Chambers* did. This argument does not mean that legislative prayer inhabits First Amendment free-range. Not at all; on the contrary, there are several robust norms of constitutional limitation

which must be observed by any praying public body. Those norms must make sense, however, in the legislative prayer context. They must also be consistent with our country's unbroken tradition of legislative prayer, and this Court's validation of it in *Marsh v. Chambers*.

A public body desiring to open its sessions with an invocation need look no further than *Marsh* itself for the limiting principles to guide its practice. First, the public body should ensure that it is not acting with an improper motive in selecting prayer-givers.[11] To require the public body to go beyond this requirement of proper motive, however, places burdens on the practice that the Constitution does not demand; by requiring the Town to invite clergy from outside its borders, the Second Circuit did just this. Furthermore, such requirements are inconsistent with the definition of legislative prayer as a tolerable acknowledgment of beliefs widely held. If a predominantly Christian community, for example, is required to bring in from outside the community equal numbers of speakers from various faiths, the prayers will necessarily be a less accurate representation of the beliefs widely held within the community.

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[11] For example, although selecting a single minister to deliver the prayer at every meeting of a town board would not, standing alone, violate the Establishment Clause under *Marsh*, it would be impermissible if a majority of the board members were members of a particular church, and they selected their pastor with the intent to promote the church itself.

As does the proper motive requirement, the second requirement under *Marsh* – that the public body not exploit the prayer opportunity to proselytize or disparage a particular faith – flows from the expressed purpose of legislative prayer to seek Divine guidance for the work of the legislators or public officials. The acts of proselytizing and disparaging fall outside this purpose. Although *Marsh* does not expressly require it, the public authority would be wise to advise invited speakers of the nature and purpose of the occasion – to invoke Divine assistance upon the deliberations, and to give thanks for the blessings which heretofore have been bestowed – and that these aims naturally exclude "proselytizing" and "disparaging." The prayer-giver should be encouraged to pray according to his or her conscience as informed by the teaching of the prayer-giver's religion. The prohibition against proselytizing does not mean that the prayer-giver cannot convey his or her view of religious truth. Rather, the prayer-giver may not induce the listeners to convert to his or her faith.[12] If an individual violates this guideline or uses the opportunity to disparage other faiths, the public authority should decline to extend any further invitation to pray to that particular individual.

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[12] *See* http://www.merriam-webster.com/dictionary/proselytize (defining the term "proselytize" as "to induce someone to convert to one's faith").

CONCLUSION

This Court's decision in *Marsh v. Chambers* affirmed legislative prayer as a practice deeply rooted in our nation's longstanding historical and constitutional tradition involving public petitions for Divine guidance by members of our civic institutions in the carrying out of their duties. The *Lemon*-based "endorsement" test applied by the court of appeals is inapplicable to legislative prayer as defined in *Marsh* and, if adopted by the Court, would eradicate a practice cherished by Americans since the founding. For all of the foregoing reasons, the Court should once again affirm the applicability of *Marsh* to legislative prayer and reverse the judgment of the court of appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF *AMICUS CURIAE*, BREVARD COUNTY, FLORIDA, IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE*, BREVARD COUNTY, FLORIDA, IN SUPPORT OF PETITIONER

Amicus Curiae, Brevard County, Florida, respectfully files its Brief in Support of Petitioner, Town of Greece, New York, in this case as follows:

STATEMENT OF IDENTITY OF *AMICUS CURIAE* AND INTEREST IN THE CASE

Brevard County presents this statement of identity and interest in support of its contention, as *amicus curiae* to this Honorable Court.

Brevard County is a political subdivision of the State of Florida located on the Atlantic coast in the state's central region. Thus, pursuant to Supreme Court Rule 37.4, Brevard County, Florida submits this brief in support of the Petitioner in this case in order to allow the County to present its arguments on the issues.

SUMMARY OF THE ARGUMENT

Though this case involves pre-meeting prayer practices validated in *Marsh v. Chambers*, 463 U.S. 783 (1983), Brevard County argues that the case at bar presents a unique opportunity to combine the various constitutional tests for establishment into a single test that subsumes every other test, factor, rationale, standard and indicia of establishment this Honorable Court has fashioned after two hundred years of wrestling with establishment issues. The opportunity is unique, argues the County, because while pre-meeting prayer is currently exempt from the prevailing test for establishment in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the existence of the *County of Allegheny v. ACLU*, 492 U.S. 573 (1989),

endorsement test applied by the lower court in this case in lieu of *Lemon*, is symptomatic of the fractured Establishment Clause jurisprudence that exhibits unpredictable twists and turns. The County argues that through the adoption of a single, overarching test derived from *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), the body of establishment law can be brought into alignment.

Since this Court has recognized that Establishment Clause jurisprudence must be "tailored to the *Establishment Clause*'s purpose of assuring that the Government not *intentionally* endorse religion or a religious practice," the County argues that the consistent thrust of the Court's analysis should be the intent and effect of government actions relating to religion. Brevard County proposes an "intent and realistic effect" test culled from the Court's analysis in *Walz* as the means to provide that consistency. Such a test would retain a semblance of the *Lemon v. Kurtzman* "primary effects" test while consigning such factors as secular purpose, endorsement, excessive entanglement, promotion, advancement and the host of other establishment analysis concepts developed by the Court over the years to their rightful status as factors to be considered in evaluating the "intent and realistic effect" of government legislation or activities as they relate to the establishment or interference with religious beliefs and practices.

The County argues that the proposed test, like all past tests used by the Court, must analyze establishment issues in the context of American culture and institutions at the time of evaluation. The County further argues that in the context of current culture and the facts adduced, the existence or non-existence of intent should be weighed together

with the realistic effect of the law or activity at issue to determine whether the Establishment Clause has been violated by the pre-meeting prayer practices at issue in this case. However, the County points out that such a weighing test would apply across the board to all Establishment Law cases without the need to look to multiple tests for establishment, a circumstance that has evolved through two centuries of this Court's establishment jurisprudence. By application of the test to previously decided cases, the County shows, for example, that "intent and realistic effect" analysis would consistently apply even where secular purpose is not relevant or where the combined weight of "intent and realistic effect" might trump the non-existence of a secular purpose which, under the Court's existing precedent, results in an automatic finding of establishment.

The County then shows how the proposed "intent and realistic effect" test would apply to the pre-meeting prayer case at bar, where no violation would exist; a second pre-meeting prayer case, *Pelphrey v. Cobb County., Ga.*, 547 F.3d 1263 (11th Cir. 2008), where the proposed test would not change the actual result; and two Creationism cases which, argues the County, demonstrates the flexibility of the test in its application to every variety of Establishment Clause jurisprudence.

ARGUMENT

PRE-MEETING PRAYER SHOULD BE UPHELD UNDER AN "INTENT AND REALISTIC EFFECT" TEST DERIVED FROM *WALZ V. TAX COMMISSION OF THE CITY OF NEW YORK*.

The Plaintiffs in the district court took offense at mention of the name "Jesus Christ" by Christian

pastors invited to speak the ceremonial invocations. Offense is grounds for standing but offense is not the constitutional test for establishment of religion by a local government. Which begs the question: "What is the test for Establishment in a case involving pre-meeting prayer at a public meeting of an elected body of local government officials?" In the 21st century, the applicable constitutional test in this Honorable Court is far from clear. But this much is clear: a test that provides a consistent path through the murky depths of establishment jurisprudence is required.

In this case, the Town's "go to" decision from this Honorable Court is unquestionably *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, this Court eschewed its own three prong test for determining whether a government has established religion within the meaning of the First Amendment's Establishment Clause, a test fashioned in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Instead, the *Marsh* Court carved out a "tradition" exception to the Establishment Clause as applied to pre-meeting prayer. In creating this exception, the Court relied on historical evidence that sessions of legislative bodies have opened with prayer from the founding of the United States right up to the time the *Marsh* case was decided in 1983. *Marsh* at 786. The Court reasoned that since "the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer", and because the practice has "coexisted with the principles of disestablishment and religious freedom" from the very beginning of the country, pre-meeting legislative prayer could not historically have been viewed by the founding fathers as a violation of the Establishment Clause. *Marsh* at 786, 788. Accordingly, the *Marsh* court determined that this

history established pre-meeting legislative prayer as a deeply embedded tradition in the history of the country. *Marsh* at786.

In *McCreary County v. ACLU*, Justice Souter noted that the *Marsh* Court had rejected the *Lemon* test for establishment in favor of a "good reason to hold governmental action legitimate even where its manifest purpose was presumably religious." *McCreary County* 545 U.S. 844, 859, fn. 10 (2005). Implicit in Justice Souter's footnote was the realization that the Court had refused to apply the secular purpose prong of the *Lemon* test, while being more or less oblivious to the primary effect and excessive entanglement prongs. Put another way, in *Marsh*, the Court could be viewed to have rejected the absence of secular purpose as establishment in favor of a historical context suggesting pre-meeting prayer has, for 200 years, never been seen to have the effect of establishment. It was with that backdrop that Justice Souter expressed this mild vexation with the Establishment Clause jurisprudence of this Honorable Court: "tradeoffs are inevitable, and an elegant interpretative rule to draw the line in all the multifarious situations is not to be had." *McCreary County* at 875.

A. A Reconstituted Constitutional Test for Establishment

Brevard County respectfully, but mightily disagrees with Justice Souter's assessment that "an elegant interpretative rule to draw the line in all the multifarious situations is not be had" in the Court's Establishment Clause jurisprudence. *McCreary County* at 875. A careful review of the Court's decisions addressing the Establishment Clause

reveals a myriad of tests, factors, standards, rationale and indicia for establishment devised by this Honorable Court during its many years of traversing the "tight rope" of Establishment Clause issues. But only one "test" subsumes in a single, eloquently simple question all of the factors, standards, rationales, tests and indicia of establishment the Court has promulgated in its struggle to state what is and is not government establishment of religion under the Establishment Clause.

It is a test that has been largely overlooked by this Honorable Court since its birth in the Court's 1970 decision, *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970). It is a test this Court, by its own assessment, has used "to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion." *Walz* at 672. It is a test that is the root jurisprudential DNA found in all subsequent indicia of establishment that have evolved in this Court including the secular purpose, primary effects and excessive entanglement analysis in *Lemon* and the endorsement test in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

The test "which each value judgment under the Establishment Clause turns upon" as announced in *Walz* was this: "whether particular acts (of government) in question are *intended* to establish or interfere with religious beliefs and practices or *have the effect* of doing so?" [emphasis added] *Walz* at 669. The intent and effect test posed in the form of a question was punctuated by this observation from the *Walz* Court: "Any move that *realistically* 'establishes' a church or tends to do so can be dealt

with while this Court sits.'" [emphasis added] *Walz* at 678.

The County asserts the *Walz* test, as posed by the Court, requires only the slightest tinkering to reduce other Establishment Clause tests to the lesser status of factors helpful for *realistically* evaluating the existence or non-existence of establishment. *Walz* at 678. If adopted, the test will consistently conform to the interpretive guide of neutrality followed in all Establishment Clause cases since *Everson v. Board of Ed. of Ewing*, 330 U.S. 1 (1947). *See: McCreary County* at 874.

As proposed by Brevard County, the test is this: Were the particular acts of government intended to establish or interfere with religious beliefs or practices *and* did the government acts *realistically* have the effect of establishing, interfering with or religious beliefs or practices?

For purposes of establishment issues at the local level, Brevard County suggests that intent can only be viewed as involving a deliberate act or acts of establishment by or attributable to the collegial governing body. The County also asserts that under the proposed modification to the *Walz* "intent" analysis, secular purpose—the objective of a local government ordinance or practice—should be only one of many possible indicia of intent to establish or interfere with religious beliefs or practices. However, under the proposed test—unlike the secular purpose prong in the *Lemon* test, which can be dispositive of a finding of establishment, *Edwards v. Aguillard*, 482 U.S. 578 (1987)—a finding of intent or lack of intent to establish or interfere with religious beliefs or practices does not automatically equal establishment. Rather, intent must be weighed along with the realistic effect of the government's action.

This modified *Walz* test will produce analysis "tailored to the *Establishment Clause*'s purpose of assuring that government not *intentionally* endorse religion or a religious practice." [emphasis added] *Edwards* at 587.

An analysis of how the proposed *Walz* "intent and realistic effect" test would be applied to the facts in this case and another already decided case involving pre-meeting prayer, *Pelphrey v. Cobb County*, 547 F.3d 1263, 1267 (11th Cir. 2008), will be presented later in this brief. That analysis will occur in the same manner employed in this Court's review of other cases applying the various tests for establishment that have evolved over the years. It is an analysis in which context is key.

Context is Key

As with any test for establishment employed by the Court detail and context are key, *McCreary County* at 867, 874. Examples of the importance of "context" in this Court's Establishment Clause jurisprudence are evident in the previously discussed cases. *See*, *McCreary County* [context of a solitary display of Ten Commandments in a place of prominence on public property is establishment]; *Walz* [tax exemptions are not establishment in the historical context of two centuries of uninterrupted history of freedom from taxation]; *Marsh* [in the context of historical tradition of pre-meeting prayer is not establishment], as well as *Salazar v. Buono*, 559 U.S. 700 (2010) [courts should give sufficient consideration to the context in which a statute was enacted and the reasons for its passage].

Therefore, prior to demonstrating how the "*intent and realistic effect*" test would provide a workable rationale for the wide variety of

Establishment Clause cases brought before this Court—including the current case involving the Town of Greece—the modern context of typical pre-meeting prayer at public meetings of elected local government officials should be considered for analysis.

The Context of Pre-Meeting Prayer

One must make a purposeful and conscious effort to find religion in a 21st century America enamored with sports, social media, the Internet, video games, reality TV, negative nightly news and a film industry glorifying sex, violence, serial killers, and zombies. The last place any reasonable person with breath in their lungs would conclude that they had found religion is at a meeting of elected officials who, for better or worse in these modern times, rank at the same depth of credibility among many of their constituents as used cars salesmen and lawyers.

As anyone who has recently sat through a meeting of their local elected officials knows, elected representatives of local government gather together to hear their constituents' oft-times animated, too often agitated concerns about exclusively *secular* issues ranging from high taxes and bloated government to protection of the environment, animal rights and the community's overgrown breeding grounds for snakes, rats and other vermin. If any religion is being established or endorsed at such meetings, it is the footnote religion, Secular Humanism—the religion called out by the Honorable Mr. Justice Black in footnote 11 of the Court's opinion in *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

In that context, how incredulous is the claim that any religion can be "established" as the faith of

the realm by local officials within these United States on the theory that a mythical objective observer "might feel" excluded from the political community if standing, sitting or staying out of the room at the start of a meeting featuring, as its first item, an agendaed but largely ceremonial one or two minute pre-meeting invocation seeking wisdom, discernment and direction from a higher power, be it God, Jesus Christ, Allah, Apollo, the Great Spirit or Mother Earth? In these modern times any person redressing their government by reading from Scripture at a public meeting as an exercise of their constitutional right to Free Exercise during his or her allotted three minutes of agendaed Public Comment is invariably met with smirks, rolling eyeballs and knowing nods from many an unpersuaded secular skeptic sitting in the audience—with never an "Amen" being heard.

Experience teaches that elected officials of the government closest to the people are, for the most part, highly attentive to the political grievances, positions and recommendations of their constituents without inquiry into the religious affiliations, prayer preferences or lack thereof, of the potential voters with whom they have contact at a public meeting where no constituent is "forced" to attend or sit through the first item on the agenda—the invocation. To the local elected official and virtually all secular constituents who manage to arrive in time for the invocation, a moment or two of pre-meeting prayer is mere recognition of a respectful tradition; a momentary diversion in the context of the overwhelmingly secular purpose that is the business of city and county government—a secular purpose, ironically, sanctioned by Jesus Christ himself upon announcing the tenet "Render to Caesar the things

that are Caesar's, and to God the things that are God's,"[1] when questioned about the lawfulness of paying taxes to Augustus, Emperor of Rome. If pre-meeting prayer is claimed to be a mode for establishing religion within a city or county, history has proven the tactic an abysmal failure.

B. The Application of the Proposed *Walz* Intent and Effects Test to Pre-meeting Prayer Cases

With the foregoing context in mind, Brevard County invites this Honorable Court to revisit and revise the *Walz* formulation into a test of "intent and realistic effect" as the constitutional test of establishment applicable across the board to Establishment law cases, including the pre-meeting prayer case presently before the Court. Brevard County will now explain its view of how such a test would apply in the case at bar and in a short sampling of selected cases considered by this and lower courts which, with an interesting exception, would not change the results in those reviewing courts.

1. The *Town of Greece* Case

According to the recitation of evidence in the District Court opinion,[2] there appear to be none but Christian churches in the Town of Greece. The call list for volunteer clerics included a few non-Christian religious institutions among the thirty-seven compiled by three administrative staffers who

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[1] Matthew 22:15-21. (New King James Bible)

[2] *Galloway v. Town of Greece*, 732 F. Supp. 2d 195 (W.D. NY 2010).

derived the list from private informational journals in town, together with an occasional recommendation—though some of the non-Christian candidates were added after litigation commenced. Before the District Court Judge, the three town administrative assistants responsible for soliciting clerics to deliver a prayer declared no known religious affiliation and none of them had ever had the experience of hearing an invocation at the start of any meeting of the Town Council. The Town had no written pastoral selection policy nor did the Town place any limits on who could voluntarily ask to present an invocation. The town did not edit the content of any invocation given by a presenter and many, but not all, of the actual invocations referred to the name "Jesus" during or at the end of the prayer.

The record recited in the District Court reveals that Plaintiff Stephens was offended by pre-meeting prayer and Plaintiff Galloway opposed the practice, though both would be satisfied if the content of any prayer recited only "nonsectarian" references to God, Lord or Father.

If the *Lemon* test is applied to the facts recited in the District Court decision, a question will undoubtedly be raised as to whether any credible secular purpose can be articulated in support of the cleric selection process for pre-meeting invocations and, perhaps, for the actual practice of pre-meeting prayer at a public meeting of elected town officials. But the *Lemon* secular purpose prong has been of such inconsistent and limited value as a test for determining establishment that this Court has, in some cases—including the Court's only case involving pre-meeting prayer—paid little heed to the test and resolved those cases using other rationale.

Lynch v. Donnelly, 465 U.S. 668 (1984) [display of nativity scene on private property by City not establishment]; *Marsh v. Chambers*, 463 U.S. 783 (1983) [statute authorizing expenditure of public funds for chaplain providing pre-meeting prayer not establishment.]

In fact, the *Lemon* analysis was used to invalidate a Shared Time program where secular classes were taught in sectarian schools during regular school hours by publicly employed teachers, using materials purchased with public funds in *Grand Rapids School Dist.* v. *Ball*, 473 U.S. 373 (1985). Yet only twelve years later the Court receded from the *Lemon* rationale applied in *Grand Rapids* and overruled the case in light of a change in the law evidenced in the Court's decisions over the previous twelve year span. *Agostini v. Felton*, 521 U.S. 203 (1997).

It is not surprising, therefore, that the majority decision in the lower court in this case made no mention of *Lemon* while ignoring *Marsh v. Chambers* which, as previously mentioned, exempted pre-meeting prayer from the *Lemon* test thereby eliminating any need to consider secular purpose, primary effects or excessive entanglement in this case. The lower court, instead, applied the *County of Allegheny* endorsement test in combination with its own legal judgment under a "totality of circumstances" test. *Galloway v. Town of Greece*, 681 F.3d 20 24, 25, 27(8th Cir. 2012).

A test for establishment, like the *Lemon* test, that is deemed inapplicable to certain Establishment Clause cases or subject to judicially crafted exceptions created in recognition of historical practices, tradition, good reasons or judicial fiat cannot really claim status as a viable test. Likewise,

bifurcating establishment analysis by resorting to the endorsement test set forth in *County of Allegheny* demonstrates the vagaries of establishment analysis, particularly since the endorsement test can easily be viewed not as a separate test of establishment, but as one of many factors used by this Court in analyzing whether a government act evidences the *realistic effect* of establishing or interfering with a religion or religious practice—the second prong of the revision to the *Walz* test urged by Brevard County.

The proposed *Walz* "intent and realistic effect" analysis would allow the courts to continue to use secular purpose as indicia of intent, if relevant, but would also require review of other indicia of intent. The proposed test would also consign both the excessive entanglement prong of the *Lemon* test and the *County of Allegheny* endorsement test to the status of factors to be considered in the analysis of the realistic effect of government acts.

As applied to the case at bar, the "intent and realistic effect" revision of the *Walz* intent and effect test would reveal no establishment in the pre-meeting prayer practice of the Town of Greece. There is certainly evidence that the Town's governing body took deliberate action to initiate pre-meeting invocations in 1999. However, there is no evidence of an impermissible motive or purposeful discrimination since the governing body had no role in creating the selection process that evolved prior to the initial round of objections by Galloway and Stephens. Likewise, there is no evidence that the town council took any deliberate action to ask only Christian clerics to deliver pre-meeting invocations, although there is evidence that only Christian churches were located in the town. At worst, intent to commence the practice of pre-meeting prayer could

be reasonably attributed to the council. Under the *Walz* test revision, intent to establish a religious practice may be attributable to the town, but there is no indication of a deliberative intent to advance or proselytize Christianity to the exclusion of all other religions—as evidenced by pre-meeting prayers led by Muslim and Jewish adherents at public meetings of the town council.

But under the refined *Walz* test, *intent* would be weighed together with *realistic effect*. The town did not edit or pre-approve the content of any invocation presented by a cleric delivering a moment or two of prayer prior to the commencement of the overwhelmingly secular business of the town council. Not surprisingly, Christian clerics may have delivered prayers mentioning the name "Jesus Christ", but there was no evidence that the council restricted clerics to prayers mentioning Jesus' name. In fact, the evidence showed that the Town went outside its borders to seek members of other religions to provide the invocation.

Likewise, there was no evidence or claim that the council ever attempted to stop any citizen from delivering a prayer or from quoting a verse out of the holy writings used by any non-Christian religious sect or from closing any prayer in the name of any spiritual being or entity of their choice. There was no evidence that any cleric was evangelizing or that any person was evangelized by a cleric under the auspices of an invocation delivered at a town meeting. The evidence of record does not in any way demonstrate that the Town's practice of pre-meeting prayer was being exploited to advance or proselytize Christianity in a town where all churches were already Christian churches, a fact that involved no act whatsoever on the part of the Town. Those

churches were also the sole suppliers of volunteer community clerics within the town limits. Finally, there was no evidence that the pre-meeting prayer practices had the slightest effect on the otherwise secular business of the Town government.

Therefore, when weighed together with the intent of the Town council, the realistic effect of the pre-meeting prayer as practiced in the Town of Greece would not establish the religion of Christianity even if the Court determined the Town's council had intent to establish religion or a religious practice.

2. *Pelphrey v. Cobb County, Ga.*, 547 F.3d 1263 (11th Cir. 2008)

Interestingly, the application of a refined *Walz* test in another pre-meeting prayer case, *Pelphrey v. Cobb County., Ga.*, 547 F.3d 1263 (11th Cir. 2008), yields no different result than the appellate court's decision in that case. According to the facts recited by the Circuit Court of Appeal,[3] like the Town of Greece, Cobb County had no express pre-meeting prayer policy, practice or procedure demonstrating intent to establish or interfere with religious beliefs or practices. However, unlike the case at bar, in *Pelphrey* an employee working on behalf of the County Planning Commission had stricken dark, continuous lines through "Churches-Islamic," "Churches-Jehovah's Witnesses," "Churches-Jewish," and "Churches-Latter Day Saints" in the Yellow Pages she used to obtain numbers for clerics who might be willing to give a pre-meeting prayer. However, this was not the same book of Yellow Pages

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[3] *Pelphrey* at 1266-1268

or cleric selection process used by the governing body of the county, the Cobb County Commission.

After litigation was filed, the County Commission required the consolidation of the Planning Commission's selection process with their own by eliminating the use of the black lined Yellow Pages and adopting the process used by the County Commission employee who had resulted in invocations by a variety of clerics including Christian, Jewish and Muslim. Reviewing the District Court's decision, the Eleventh Circuit Court of Appeal upheld the lower court decision finding the Planning Commission process to be a violation of the Establishment Clause but approving the County Commission process under the Establishment Clause exception announced by this Court in *Marsh v. Chambers*.

Applying the revised *Walz* "intent and realistic effect" test to *Pelphrey*, the District Court record would have revealed competent substantial evidence establishing an employee's intent to exclude certain religions from the pre-meeting prayer roster of volunteer clerics, an act that was vicariously attributed to the Planning Commission. The evidence suggested deliberate, categorical exclusion of non-Christian clerics constituting an impermissible motive and establishing intent. Moreover, by intentionally preventing all but Christian clerics from delivering pre-meeting prayer, the exclusionary act attributable to the Planning Commission had the realistic effect of endorsing Christianity. Weighed together, the "intent and realistic effect" of this selection process would reproduce the reviewing courts' decisions finding a violation of the Establishment Clause without any need to consider

whether or not there was a secular purpose or excessive entanglement.

In contrast, the employee for the County Commission did not line through non-Christian religions in her Yellow Pages. Further, there was no evidence that the County Commission had taken or was aware of any deliberate act, either as a collegial body or through its employee, suggesting purposeful discrimination or impermissible motives underlying the cleric selection process. Therefore, intent to establish Christianity was not supported by any evidence. Likewise, in the context of the exclusively secular nature of the business conducted at County Commission meetings there was no evidence even hinting that the delivery of pre-meeting prayers lasting a moment or two had the realistic effect of establishing Christianity in the community. As a result, no Establishment Clause violation would exist under the revised *Walz* test. Once again, on these facts secular purpose is irrelevant to the analysis, as is excessive entanglement. Though the perception of endorsement could be viewed as a potential effect, the weight of the lack of intent combined with some evidence of neutrality and diversity in the selection process for prayer presenters would not trip over the realistic effect prong of the proposed test.

C. The *Walz* Test Variation as Applied to Two Decided Creationism Cases

The proposed *Walz* "intent and realistic effect" test can also be applied, with interesting implications, to this Court's line of decisions shielding impressionable school aged children with Establishment Clause protection because they are deemed susceptible to religious indoctrination and

peer pressure while involuntarily attending public school. In the background of that line of cases lingers the Court's admonition that public schools fall within the "strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice." *Illinois Ex Rel. McCollum v. Board of Education of School Dist. No. 71, Champaign County*, 333 U.S. 203, 217 (1948). Post 1971 school related cases typically considered the *Lemon* test when invalidating a variety of practices, policies and laws enacted by school systems and legislatures in violation of the Establishment Clause. *See, Santa Fe Independent School District v. Doe*, 530 U.S. 290 [school policy allowing student led prayer at football games violates Establishment Clause]; *Lee v. Weisman*, 505 U.S. 577 (1992) [schools inviting clerics to recite prayers at graduation ceremonies violates Establishment Clause]; *Edwards v. Aguillard*, 482 U.S. 578 (1987) [statute banishing the theory of evolution from public school classrooms violates Establishment Clause]; *Grand Rapids School Dist.* v. *Ball*, 473 U.S. 373 (1985) [stopping school district's use of public school teachers in Shared Time program held in sectarian schools]; *Wallace v. Jaffree*, 472 U.S. 38 (1985) [invalidating Alabama statute authorizing moment of silence for school prayer]; *Stone v. Graham*, 449 U.S. 39 (1980) [posting copy of Ten Commandments on public classroom wall is establishment].

1. *Edwards v. Aguillard*, 482 U.S. 578 (1987)

Of particular interest among the preceding string of cited cases is *Edwards v. Aguillard*, a

decision which is helpful in understanding how the proposed *Walz* test variation would affect two similarly decided cases, the other being a District Court decision referred to in footnote 9 of the *Edwards* decision. *McLean v. Arkansas Board of Education*, 529 F. Supp. 1255 (E.D. Ark 1982).

In *Edwards*, this Court used the *Lemon* test to analyze the validity of a Louisiana Creationism Act which forbade the teaching of the theory of evolution in public schools unless accompanied by instruction in "creation science." In considering the secular purpose prong, this Court made this revealing statement: "A governmental *intention* to promote religion is clear when the State enacts a law to serve a religious purpose. This *intention* may be evidenced by promotion of religion in general...or by advancement of a particular religious belief." [emphasis added] *Edwards* at 585. The Court then noted that "[i]f the law was enacted for the purpose of endorsing religion, 'no consideration of the second or third criteria [of *Lemon*] is necessary'", *Edwards* at 587—thereby elevating the absence of a secular purpose to establishment without any consideration of effects.

In reality, the *Edwards* language honing in on "governmental *intention*" suggests that "purpose"—be it secular or religious—is actually an indicator of intention, which is the first prong in the proposed *Walz* "intent and realistic effect" test, a test where deliberative intent, impermissible motives, secular purpose and purposeful discrimination would be factors considered in determining the absence or presence of intent to establish religion or a religious practice which is then weighed together with realistic effects in the analysis of establishment.

Applying the proposed "intent and realistic effect", the Court can be seen to have essentially found an intent to promote religion based on the lack of credible evidence supporting academic freedom as the proclaimed secular purpose for the statute—a posture confirmed in Justice Black's concurring opinion where he stated "[m]y examination of the language and the legislative history of the Balanced Treatment Act confirms that the *intent* of the Louisiana Legislature was to promote a particular religious belief." [emphasis added] *Edwards* at 603. But under the proposed test, intent would have to be weighed together with the *realistic effect* of the legislation.

When the "realistic effect" component of the proposed test is applied, the Court's actual decision in *Edwards* would have been supported by its analysis of the legislative history of the statute which was deemed unpersuasive as proof of the claimed secular purpose—academic freedom. The effect of the statute, as determined by the Court, was to undermine a comprehensive scientific education and "affect the teaching of the one scientific theory that historically has been opposed by certain religious sects." *Edwards* at 587, 593. Weighing the "intent and realistic effect" prongs as applied to the *Edwards* facts and conclusions, the refined *Walz* test would reach the same establishment violation result as the *Edwards'* court without equating the absence of secular purpose, alone, to establishment.

The implications of displacing "absence of secular purpose", in and of itself, as establishment can be seen in the discussion of the next case involving the issue of creationism.

2. *McLean v. Arkansas Brd. of Education*, 529 F. Supp. 1255 (Ark E.D. 1982)

The facts in *McLean v. Arkansas Brd. of Education*, suggest an interesting application of the proposed "intent and realistic effect" test. The facts recited by the District Court show that in 1981 the State of Arkansas adopted the "Balanced Treatment for Creation-Science and Evolution-Science Act." The essential mandate of that law was stated in its first sentence: "[p]ublic schools within this State shall give balanced treatment to creation-science and to evolution-science." *McLean* at 1256. The trial court devoted several pages of its analysis of the statute to a description of the history of Christian "fundamentalism," creationism and the prominent role of fundamentalists in the legislative history of the law. Applying the *Lemon* test, the trial judge cited the legislative history for the conclusion that there was no secular purpose supporting the statute because the Act was passed with the specific purpose of advancing religion. *McLean* at 1264.

Chief among the trial court's concerns with the substance of the statute was the definition of "creation-science" set forth in section 4(a). The court noted that section 4(a) "revolves around 4(a)(1) which asserts a sudden creation 'from nothing.'" *McLean* at 1264. Section 4(a) of the Act is reproduced below showing subsection (1) in italics:

> Definitions. As used in this Act:
>
> "Creation-science" means the scientific evidences for creation and inferences from those scientific evidences. Creation-science includes the scientific evidences and related

> inferences that indicate: *(1) Sudden creation of the universe, energy, and life from nothing;* (2) The insufficiency of mutation and natural selection in bringing about development of all living kinds from a single organism; (3) Changes only within fixed limits of originally created kinds of plants and animals; (4) Separate ancestry for man and apes; (5) Explanation of the earth's geology by catastrophism, including the occurrence of a worldwide flood; and (6) A relatively recent inception of the earth and living kinds. [emphasis added]

McLean at 1264

The court drew this conclusion about "sudden creation from nothing": "[s]uch a concept is not science because it depends upon a supernatural intervention which is not guided by natural law. It is not explanatory by reference to natural law, is not testable and is not falsifiable," which were three of the five characteristics defining science, according to the evidence reviewed by the court. *McLean* at 1267. The District Court judge also concluded that "[b]oth the concepts and wording of Section 4(a) convey an inescapable religiosity" noting that "[s]ection 4(a)(1) describes 'sudden creation of the universe, energy and life from nothing" and that "[e]very theologian who testified, including defense witnesses, expressed the opinion that the statement referred to a supernatural creation which was performed by God." *McLean* at 1265. Finally, the court concluded that "[t]he ideas of 4(a)(1) are not merely similar to the literal interpretation of Genesis; they are identical and parallel to no other story of creation," M*cLean* at 1265, and that "[t]he argument that creation from

nothing in 4(a)(1) does not involve a supernatural deity has no evidentiary or rational support" being only "a concept unique to Western religions. *McLean* at 1265.

Ultimately, the court concluded that "[t]he facts that creation science is inspired by the Book of Genesis and that Section 4(a) is consistent with a literal interpretation of Genesis leave no doubt that a *major effect* of the Act is the advancement of particular religious beliefs." [emphasis added] *McLean* at 1266. The court also found that "[t]here is no way teachers can teach the Genesis account of creation in a secular manner." *McLean* at 1272. Accordingly, the court held that the Act would also have the effect of "creating an excessive and prohibited entanglement" between school officials and religion. *McLean* at 1272.

The 1982 result in *McLean* would not differ under the revised *Walz* "intent and realistic effect" test. In 2013, however, the result might be different if the statute had limited the definition of creation-science to "[s]udden creation of the universe, energy, and life[1] from nothing."

The *McLean* decision was published in 1982. Fifteen years later, in 1997, physicist Alan Guth proposed that, in fact, the laws of quantum physics suggest the universe was indeed created from

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[1] Quantum physics allows for the theoretical possibility that a universe with life could have instantaneously and retroactively collapsed into existence at any time during its history when it was first observed. McFadden, John Joe. *Quantum Evolution*, W.W. Norton & Company (2000) p. 195; *See also:* Wheeler and Zurich (Editors), *Quantum Theory and Measurement* (1983) p. 209; Rosenblum, Bruce and Kuttner, Fred (2011-07-01), "Quantum Enigma: Physics Encounters Consciousness" (Kindle Locations 4140-4141)

nothing! Guth called it "the ultimate free lunch."[5] With the advancement of quantum physics this "creation from nothing" idea has since become mainstream science, as demonstrated in the 2011 vintage Discovery Channel documentary titled "The Big Bang" aired as part of Discovery's made-for-television series titled "*How the Universe Works.*"[6] The "Big Bang" segment featured commentary by several prominent theoretical physicists including popularizers of physics, renowned physicists Stephen Hawking and Dr. Mikio Kaku. Here is one way that popular science program described the now mainstream scientific view about how the universe did indeed begin from nothing. "At the dawn of time, the universe explodes into existence, *from absolutely nothing into everything*"—including the laws of physics.[7] [emphasis added] The event is called the "Big Bang," which "*How the Universe Works*" described as the universe erupting from "a single point, infinitely small, unimaginably hot, a super-dense spec of pure energy."[8]

This evolution in scientific knowledge begs a new, though hypothetical question in the context of Brevard County's proposed revision to *Walz* requiring analysis of the "intent and realistic effect" of government actions in assessing Establishment Clause issues. How would a court analyze alleged

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[5] Lemley, Brad, April 2002, "Guth's Grand Guess", *Discover Magazine*

[6] "How the Universe Works", Narr. Mike Rowe, Discovery Communications, LLC, 2011

[7] "The Big Bang", at 3/33 00:14, 1:24, *How the Universe Works*, Narr. Mike Rowe, Discovery Communications, LLC, 2011

[8] *Id.* at 3/33, 0:24

establishment in a case where a statute required the teaching of "creation from nothing" as both a scientific and religious concept now that science has determined, setting aside the issue of cause,[9] the Judeo-Christian Bible got the description of a universe created from nothing correct in the Book of Genesis?

The answer is the context in which the "intent and realistic effect" test is applied. Clearly, because the Genesis account of creation from nothing is now supported by science, a statute simply requiring the teaching of a creation from nothing concept found in the Bible alongside a mainstream scientific theory providing evidence that the biblical concept is both an accurate historical and scientific account of creation would not, without more, violate the Establishment Clause under the proposed "intent and realistic effect" test. The purpose of any Legislature enacting such a hypothetical statute could be argued to be to maximize the comprehensiveness and effectiveness of science instruction for having encouraged the teaching of all scientific theories about the origins of humankind—a purpose condoned by this Court's Establishment Clause jurisprudence. *Edwards* at 588. With this valid secular purpose, no intent to establish religion exists.

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[9] Scientists cannot really pinpoint a cause for a Big Bang creation event other than to fall back on the random creation of particles from nothing allowed by the laws of quantum physics (which laws, problematically, break down at the Big Bang singularity and would not activate until after the Big Bang took place [Stephen Hawking, "The Beginning of Time": http://www.hawking.org.uk/the-beginning-of-time.html]). In contrast, the Bible attributes the cause of creation to God.

Even assuming such a statute might evidence an intent to establish religion if that purpose was imputed to the Legislature by their words or acts, the non-secular purpose would be outweighed by the realistic effect of such a statute—the teaching of an accurate statement of science and history, the latter of which this Court has recognized as a permissible context in which to study the Bible in public schools without violating the Establishment Clause.[10] See, *Abington v. Schempp*, 374 U.S. 203 (1963) [study of the Bible for its literary and historic qualities and study of religion, when presented objectively as part of secular program of education, is permissible under Establishment Clause]. Thus, the hypothetical version of the statute would not violate the Establishment Clause under the test proposed by Brevard County, even where the *Lemon* secular purpose prong, as currently applied by this Court, might require invalidation of such a statute under the Establishment Clause. *Edwards v. Aguillard, supra.*

CONCLUSION

Under the proposed "intent and realistic effect" revision to the *Walz* intent and effect test, pre-meeting prayer would survive even if intent was imputed to a local government due to a lack of secular purpose for the practice. Under the proposed

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[10] The realistic effect under an "accurate historical account" analysis would also apply if, setting aside cause, the nature and sequence of events in the evolution of the universe described in Genesis chapter 1 (NIV) was determined to match the scientific account, a plausible argument when of the scientific discoveries over the past twenty years are compared to the description of events in Genesis 1.

test, the presence of intent would have to be weighed together with the realistic effect of the practice. In a case involving a moment or two of pre-meeting prayer delivered before a body of elected officials engaged in the overwhelmingly secular business of local government, no realistic effect of advancement, proselytization or endorsement of a particular religion has taken place.

As to pre-meeting prayer in general, there is no evidence the practice has had any realistic or discernible impact whatsoever on either the steady rise of secularism and a correlating steep decline in the influence of religion[11] in America. Moreover, there is absolutely no evidence that the 200 plus years of two minute pre-meeting prayers—asking for wisdom and discernment in behalf of elected officials charged with making entirely secular decisions at public meetings—have realistically established either religion in general or a specific religion in this country or in any state, county or municipality in this country including the Town of Greece.

In secular America, proponents of complete separation between church and state might view pre-meeting prayer as a breach in the wall of separation resulting in the establishment by a local government of religion, in general, or a single religion in particular. But such proponents of separation cannot seriously be viewed as "objective persons," within the meaning of the Court's use of the term in Establishment Clause cases, specifically within the

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[11] According to a May 29, 2013 Gallup poll, 77% of Americans say religion is losing its influence on American life. Newport, Frank, "Most Americans Say Religion is Losing Influence in U.S.", *Gallup. Com*, http://www.gallup.com/poll/162803/americans-say-religion-losing-influence.aspx

framework established through the multiple decisions this Court has made consistently recognizing that complete separation of church and state is a practical impossibility. *McCreary* at 875-876; *Lemon* at 614. To those opposed to pre-meeting prayer the practice may reasonably be viewed as a small stain on the wall of separation, but not as a structural defect.

Brevard County therefore urges this Court to zest the *Lemon* test by shaving off secular purpose and excessive entanglement as prongs in the test for establishment. Both concepts should be consigned to their rightful role as indicia of government intent under a more workable, encompassing and predictable *Walz*-based "intent and realistic effect" test. The County suggests that the revised *Walz* test would only implicate establishment of religion when actual proof of intent and bona fide effects would induce a *reasonable person* living in the context of a highly secular modern America to understand that (1) the government has realistically and intentionally attempted to establish religion or a religious practice through impermissible motives or purposeful discrimination *and* (2) implemented that intent through acts which, either realistically advance, proselytize or endorse religion or realistically cause excessive entanglement between religion and government.

Offense to persons hostile to a particular religion or religion in general is not and should not be the constitutional test for Establishment in a case such as pre-meeting prayer where government activity has merely spawned a largely ceremonial and respectful reminder that religion is still a patch, perhaps faded, on a corner of the crazy quilt that is America's diverse and secularized culture. Upon

resurrection and revision of the *Walz* test being urged by Brevard County, the country can rest assured that Establishment will be kept at bay as long as this Honorable Court still sits.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-696

In the

Supreme Court of the United States

TOWN OF GREECE, NEW YORK,

Petitioner,

v.

SUSAN GALLOWAY, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, the Claremont Institute's Center for Constitutional Jurisprudence,[1] is dedicated to upholding the principles of the American Founding, including the individual liberties the Framers sought to protect by adoption of the Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Arizona Christian School Tuition Organization v. Winn*, ___ U.S. ___, 131 S.Ct. 1436 (2011); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

The Center is vitally interested in preserving the freedom of religion as one of the central liberties protected by the Constitution. The First Amendment prohibits interference with an individual's free exercise of religion, but does not require a prohibition on public acknowledgment of our religious heritage. Indeed, the history of the nation both before and after adoption of the Bill of Rights demonstrates a commitment to public recognition of the central role that religion plays in the life of the nation and its citizens.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief by filing blanket consent with the clerk.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Court's Establishment Clause jurisprudence is in a hopeless tangle. The tests developed by this Court have led to wildly conflicting decisions by the appellate courts and yield results far removed from the original purpose of the Religion Clause of the First Amendment.

A proper interpretation of the Religion Clause requires the Court to consider the reasons that states pressed for its inclusion in the Constitution. Further evidence of the meaning of the First Amendment is found in the practices of the three branches of the federal government in the wake of its ratification by the states. This history demonstrates that the concern motivating the "no law respecting an establishment of religion" language of the First Amendment was federal government coercion of private religious conduct. Although adopted as a federalism protection, this portion of the First Amendment has been incorporated against the states. But the courts have lost sight of the "no coercion" principle at the foundation of the amendment.

This Court should return to the original understanding of the "no coercion" principle in interpreting how this provision applies against state and local government. In the absence of coercion, the *content* of legislative prayer is beyond the control of the judiciary.

ARGUMENT

I. THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE FAILS TO PROTECT INDIVIDUAL LIBERTY IN RELIGIOUS OBSERVANCE

As then Justice Rehnquist noted in his dissent in *Wallace v. Jaffree*, "[I]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history." 472 U.S. 38, 92 (1985)(Rehnquist, J., dissenting). Twenty-eight years later, it is clear that Justice Rehnquist's admonition fell on deaf ears. The direct result of this is "[A]n Establishment Clause jurisprudence in shambles." *Utah Hwy Patrol Ass'n v. American Atheists, Inc.*, __ U.S. __, 132 S.Ct. 12 (2011) (denying cert. in *American Atheists Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010)(Thomas, J. dissenting).

The constitutional history that should be considered here includes reasons for adding the Religion Clause to the Constitution and the founding generation's interpretation of the clause as they applied it to public life. As this Court has stated, the First Congress "...was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument." *Myers v. United States*, 272 U.S. 52, 174-75 (1926); *see also Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (stating that constitutional interpretations of those who drafted the document are "contemporaneous and weighty evidence of its true meaning").

A. The Religion Clause Was Added To The Constitution To Ensure That The Federal Government Would Not Interfere With the Individual Freedom Of Religion

In colonial America, state establishments of religion were ubiquitous. While the Puritans ruled New England to advance their vision of a Christian commonwealth, the Church of England held the allegiances of colonies like Virginia and Georgia. Michael McConnell, *The Origins And Historical Understanding Of Free Exercise Of Religion*, 103 Harv. L. Rev. 1409, 1422-23 (1990) [hereinafter McConnell, *Origins of Free Exercise*]. New York and New Jersey welcomed those that did not fit into the Puritan or Anglican tradition. *Id.* Pennsylvania and Delaware were founded as safe havens for Quakers, while Maryland was founded as a refuge for English Catholics who suffered persecution in Britain. *Id.* Most notably, Roger Williams founded Rhode Island as a colony for Protestant dissenters after the General Court banished him from Massachusetts. *Id.*

This variety of religious establishments allowed colonists to settle in a place that most accommodated their own religious preferences. Even as disestablishment took hold after the Revolution, states viewed religious belief and practice as essential to a civil society. *See* Mass. Const. of 1780, pt. 1, art. III ("[T]he happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality.."); Petition for General Assessment (Nov. 4, 1784), *reprinted in* C. James, Documentary History of the Struggle for Religious Liberty in Virginia 125, 125 (1900 and photo.

reprint 1971) ("[B]eing thoroughly convinced that the prosperity and happiness of this country essentially depends upon the progress of religion..."); Washington, *Farewell Address* (Sept. 17, 1796), *reprinted in* 1 Documents of American History 169, 173 (H. Commager 9th ed. 1973) ("[O]f all the dispositions and habits that lead to political prosperity, religion and morality are indispensible supports...").

This history of varied establishments and trend of disestablishment provided the impetus for the Religion Clause. Antifederalists were alarmed at the Constitution's failure to secure the individual rights of Americans and were concerned that the federal government would have the power to declare a national religion, thus squelching the practices of religious minorities. *See Letters from the Federal Farmer (IV)* (Oct. 12, 1787), reprinted in 2 The Complete Anti-Federalist 245, 249 (Herbert J. Storing ed., 1981); *see also Essay by Samuel, Indep. Chron. & Universal Advertiser (Boston),* Jan. 10, 1788, reprinted in 4 The Complete Anti-Federalist, *supra*, at 191, 195. Though not hostile to state establishments, the antifederalists were concerned that a federal government might "[M]ake every body worship God in a certain way, whether the people thought it right or no, and punish them severely, if they would not." *Letters from a Countryman (V)*, N.Y, J., (Jan. 17, 1788), reprinted in 6 The Complete Anti-Federalist, *supra*, 86, 87. As one antifederalist noted regarding the differences between different states, "It is plain, therefore, that we [Massachusetts citizens] require for our regulation laws, which will not suit the circumstances of our southern brethren, and the laws made for them would not apply to us." *Letters of Agrippa*

(XII), Mass. Gazette, (Jan. 11, 1788), reprinted in 4 The Complete Anti-Federalist, *supra,* 93, 94.

Acting upon these concerns, at least four states submitted amendments concerning religious liberty along with their official notice of ratification of the Constitution. *See Declaration of Rights and Other Amendments, North Carolina Ratifying Convention* (Aug. 1, 1788), reprinted in 5 The Founders' Constitution at 18 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter The Founders Constitution] ("[A]ll men have an equal, natural, and unalienable right to the free exercise of religion, according the dictates of his conscience.."); *New Hampshire Ratification of the Constitution* (June 21, 1788), reprinted in 1 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, at 325, 326 (Jonathan Elliot ed., 2d ed., William S. Hein & Co., Inc. 1996) ("Congress shall make no laws touching religion, or to infringe the rights of conscience"); *New York Ratification of Constitution* (July 26, 1788), reprinted in The Founders' Constitution, *supra* 11-12 ("That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others."); *Proposed Amendments to the Constitution, Virginia Ratifying Convention* (June 27, 1788), reprinted in The Founders' Constitution, *supra* 15-16 ("[A]ll men have an equal, natural, and unalienable right to the free exercise of religion...").

With these demands from various states in mind, the First Congress set to work to fashion an

amendment that would appease these concerns. McConnell, *Origins of Free Exercise, supra*, at 1476-77 After debate over the exact wording of the Religion Clause in the House and the Senate, both houses agreed to the final conference committee report. 1 Annals of Cong. 88 (Joseph Gales ed., 1789). From this committee emerged the Religion Clause as it is known today: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. I.

The key term for purposes of this case is "establishment." As noted above, the Congress that proposed the First Amendment and the states that ratified it had significant experience with the concept of religious establishments. Some establishments involved governmental coercion that compelled a *form* of religious observance. Thus some states sought to control the doctrines and structure of the church. South Carolina did this through its 1778 Constitution requiring a church to ascribe to five articles of faith before being incorporated as a state church. S.C. Const. of 1778 art. XXXVIII, reprinted in 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 1626 (Ben Perley Poore ed., The Lawbook Exch. Ltd. 2d ed. 2001) (1878). Other states, like Virginia, sought to control the personnel of the church and vested the power of appointing ministers of the Anglican Church in local governing bodies known as vestries. Rhys Isaac, *Religion and Authority: Problems of the Anglican Establishment in Virginia in the Era of the Great Awakening and the Parsons' Cause*, 30 Wm. & Mary Q. 3 (1973).

The other type of government coercion at play in religious establishments involved coercion of the individual in his or her religious practice. Massachusetts, for instance, prosecuted Baptists who refused to baptize their children or attend Congregationalist services. Michael McConnell, *Establishment & Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev 2105, 2145 (2003)[hereinafter McConnell, *Establishment & Disestablishment*]. Georgia, supported the state church through a liquor tax. *Id.* at 2154. Other states limited political participation to members of the state church. *Id.* at 2178.

States that had establishments feared federal interference. *Letters of Agrippa (XII)*, Mass. Gazette, (Jan. 11, 1788), reprinted in 4 The Complete Anti-Federalist, *supra*, 93, 94. That fear was also shared by states that had no establishment. Because of the Supremacy Clause, states were concerned that Congress might impose a federal establishment that would overrule individual state rules. Thus, the First Amendment's "no law respecting an establishment of religion" provision of the Religion Clause had a clear federalism purpose. The incorporation of this provision against the states must be understood as protecting state authority to the maximum extent possible consistent with individual liberty. *Zelman v. Simmons-Harris*, 536 U.S. at 678, 679 (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. at 50 (Thomas, J., concurring). The individual liberty protected by the clause is freedom from government coercion of individual religious observance or interference with the form of religious worship.

The prohibition on any law "respecting an establishment of religion" was never meant to be a prohibition on public acknowledgement of religion. It was instead a ban on federal government coercion and federal intrusion on state authority. This distinction is clear from the rich history of religious acknowledgments and exercises by all three branches of government after adoption of the First Amendment.

B. The Founders' Understanding Of The Religion Clause As A Protection For Individual Religious Liberty Is Reflected In The Practices Of The Three Branches Of Government

The clearest example of the founders' understanding of the operation of the Religion Clause is reflected in acknowledgements of religion that were commonplace in every branch of the early federal government. Neither the courts, Congress, nor the President viewed public acknowledgements of religion as a threat to religious liberty. Instead, the founding generation embraced public religious proclamations and practices.

In the executive branch, all of the early Presidents – including Thomas Jefferson, an oft-cited proponent of strict separation between church and state - invoked the name of God in their inaugural addresses. 1 *Messages and Papers of the Presidents*, 1789-1897 at 382 (J. Richardson ed. 1897). Additionally, Presidents Washington, Adams, and Madison all declared official days of prayer and thanksgiving. *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984). In 1800, Congress approved the use of the Capitol Building as a venue for Christian worship. 10 Annals of Cong. 797 (1800). President Jefferson often frequented

these services. James Hutson, *Religion and the Founding of the American Republic* 84, 89 (1998).

Throughout history Presidents often invoked divine guidance and comfort in the midst of troubled times. Examples include President Franklin Roosevelt's prayer for the soldiers who landed on Omaha Beach (Franklin Delano Roosevelt, D-Day Speech (June 6, 1944), in http://www.historyplace.com /speeches/fdr-prayer.htm); President George W. Bush's address to Congress after the September 11 attacks (George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11 (Sept. 20, 2001), in 2 Pub. Papers of the Presidents: George W. Bush: 2001, at 1140 (2003)); and President Obama's Newtown address (Barack Obama, *Remarks by the President at Sandy Hook Interfaith Prayer Vigil*, WhiteHouse.Gov (Dec. 16, 2012), http://www.whitehouse.gov/the-press-office/2012/12/16/remarks-president-sandy-hook-interfaith-prayer-vigil).

This Court also has a long history of religious acknowledgment. "God save this Honorable Court," became the traditional opening of Court, as early as Chief Justice Marshall's time a practice that continues today. C. Warren, 2 *The Supreme Court in United States History* 469 (1922). Further, John Jay invited members of the clergy to open sessions of the New England circuit court in prayer. 2 *The Documentary History of the Supreme: Court of the United States: The Justices on Circuit, 1789-1800*, at 13-14 (M. Marcus ed. 1988).

Nowhere in the federal government was religion's influence more pronounced than in the legisla-

tive branch. Congress passed laws like the Northwest Ordinance, stating that "Religion, morality, and knowledge being necessary to good government, schools and means of education shall ever be encouraged." Northwest Ordinance of 1787, Art. III., reenacted as Northwest Ordinance of 1789, ch. 8, § 1, 1 Stat. 50. The first Congress also pressed the President to recommend a day of prayer to the people. 1 Annals of Congress 914-15 (J. Gales ed. 1789). The national motto that adorns our currency has been statutorily decreed to be "In God we trust." 36 U.S.C § 302. Perhaps most tellingly, "in the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid chaplains for the House and Senate." *Lynch*, 465 U.S. at 674. Notably, one of the Congressmen appointed to draft the bill providing for paid chaplains was James Madison, another founder who is often claimed to be a proponent of strict separation between church and state. *Marsh v. Chambers*, 463 U.S. 783, 788 n.8 (1983).

Not only does Congress still have an office of the chaplain (Office of the Chaplain, United States House Of Representatives, http://chaplain.house.gov/ (last visited July 20, 2013)), but the Capitol Building has a special prayer room set aside for use by members of the House and Senate (*County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 672 (1989) (Kennedy, J., concurring in part, dissenting in part)). The House and Senate have a prayer breakfast every Thursday morning, and they sponsor an annual Prayer Breakfast. Alan Cooperman, Bush Lauds Catholics' Role in U.S. Freedom, Wash. Post, May 21, 2005, at A6. In the House Chamber, a portrait of Moses faces the Speaker and the national

motto of "In God we trust" is etched across the wall behind the Speaker's rostrum. Eugene F. Hemrick, *One Nation Under God: Religious Symbols, Quotes, and Images in Our Nation's Capital* at 28 (2001). The seals of religious leaders that were lawmakers also adorn the House Chamber walls, including Popes, saints, a Jewish rabbi, and a Muslim sultan. *Id.* at 49-51. The Capitol rotunda is emblazoned with a fresco of George Washington ascending into heaven. Architect of the Capitol, *The Apotheosis of Washington*, http://www.aoc.gov/cc/art/rotunda/apotheosis/Overview.cfm (last visited July 23, 2013). Finally, the front door of the Capitol is adorned with crucifixes and depictions of Popes, Franciscan monks, and rosaries. Architect of the Capitol, *Columbus Doors Main Page*, http://www.aoc.gov/cc/art/coldoors/index.cfm (last visited July 23, 2013).

The United States Capitol is and always has been replete with religious imagery and religious activity, yet none of the traditions or adornments are rightly conceived as a threat to religious liberty. Indeed, the government of the early Republic celebrated our rich religious history with a variety of public acknowledgements, many of which continue today. In view of the founding generation's disposition towards religion in the public square, a correct reading of the Religion Clause evidences no hostility to public religious acknowledgment. Acknowledgment of religion – even the start of legislative sessions with prayer – does not coerce any person to adhere to any particular doctrine nor does it interfere with ecclesiastical decisionmaking.

C. The *Lemon*/Endorsement Test Does Not Advance The Purpose Of Individual Liberty In Religion

Departing from this history, this Court established a three-part test for reviewing Establishment Clause claims in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). One prong of the *Lemon* test has evolved into a freestanding "endorsement" test. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J. concurring in the judgment). Under the *Lemon*/endorsement test, courts must ask whether a theoretical objective, neutral observer would believe that the government is endorsing a particular religion. *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308 (2000). The type of government coercion meant to be outlawed by the Religion Clause is not considered in this analysis. The circuit courts of appeals struggle to apply these tests. *See, e.g., Doe v. Elmbrook School Dist.*, 687 F.3d 840, 849-50 (7th Cir. 2013) (petition for writ of certiorari pending, No. 12-755); *Johnson v. Poway Unified School Dist.*, 658 F.3d 954, 974 (9th Cir., 2011); *Doe v. Indian River School Dist.*, 653 F.3d 256, 267 (3rd Cir., 2011); *American Civil Liberties Union of Ohio v. DeWeese*, 633 F.3d 424, 434 (6th Cir., 2011).

Members of this Court have noted that strict application of this "endorsement test" would "invalidate scores of traditional practices recognizing the place religion holds in our culture." *Allegheny*, 492 U.S. at 674 (1989) (Kennedy, J., dissenting). Lower courts, attempting to weave their way between the language of the test and historical practices, have understandably come to hopelessly conflicting deci-

sions. Indeed, "five sitting Justices have questioned or decried the *Lemon*/endorsement test's continued use." *Utah Hwy. Patrol Ass'n*, 132 S.Ct. at 21 (Thomas, J. dissenting). Over the course of *Lemon's* existence, this Court has ignored it (*See Zelman v. Simmons-Harris, supra*), applied it (*See Santa Fe Indepent School Dist.*, 530 U.S. at 314) and declared that it is not binding (*See Lynch*, 465 U.S. at 679).

The height of this confusion occurred in 2005 when this Court applied the *Lemon* test to declare a courthouse display of the Ten Commandments to be unconstitutional, *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 859-66 (2005), and then, on the same day, declined to apply *Lemon* in upholding a Ten Commandments display on the grounds of a state capitol, *Van Orden v. Perry*, 545 U.S. at 696-97 As one appellate court put it, "we remain in Establishment Clause purgatory." *American Civil Liberties Union of Kentucky v. Mercer County, Ky.*, 432 F.3d 624, 636 (6th Cir. 2005).

The Court's discordant analysis of Establishment Clause challenges has resulted in widespread confusion throughout the lower courts. One appellate court held a public crèche display unconstitutional under the Establishment Clause, while another found it to be constitutional. *Compare Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990) *with American Civil Liberties Union of Kentucky v. Wilkinson*, 895 F.2d 1098 (6th Cir 1990). Another court held that a menorah displayed near a city hall was unconstitutional, while it later held that a menorah displayed at a public school did not violate the Establishment Clause. *Compare Kaplan v. Burling-*

ton, 891 F.2d 1024 (2d Cir. 1989) *with Skoros v. New York*, 437 F.3d 1 (2d Cir, 2006).

In assessing the constitutionality of legislative prayer, the Eleventh Circuit applied the standard set forth by this Court in *Marsh v. Chambers*, upholding the constitutionality of legislative prayer. *Pelphrey v. Cobb County, Georgia*, 547 F.3d 1263, 1278 (11th Cir. 2008), while the Fourth Circuit relied on *Allegheny*, finding legislative prayer to be unconstitutional because it had the "effect of aligning the government with a particular religion under the eyes of a reasonable observer," *Joyner v. Forsyth County, North Carolina*, 653 F.3d 341,348 (4th Cir. 2011). In the instant case, the Second Circuit ruled that the Town had an obligation to consider how those who attended Town meetings would perceive the prayer practice, finding the Town of Greece's prayer practice unconstitutional. *Galloway v. Town of Greece*, 681 F.3d 20, 32 (2d Cir. 2012). The court focused on the content of the prayers given by private actors chosen by lottery. These cases are merely a sampling of the widespread confusion throughout the lower courts on how to apply the Religion Clause to public acknowledgment of religion. *Utah Highway Patrol Ass'n*, 132 S.Ct. at 21 (Thomas, J., dissenting).

With such inconsistency amongst lower courts, it is no wonder that Justice Scalia once referred to the *Lemon*/endorsement test as a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). It is time that this Court heed Justice Sca-

lia's advice and "drive a pencil through the creature's heart," finally putting *Lemon* to rest. *Id.*

II. THIS COURT SHOULD ANNOUNCE A NEW TEST MORE IN LINE WTH THE PURPOSE AND ORIGINAL UNDERSTANDING OF THE RELIGION CLAUSE

Interpreting the Establishment Clause to protect individual liberty against the backdrop of our federalist structure requires that the Court focus on the coercive nature of "establishments" as understood by those who drafted and ratified the First Amendment. *Zelman*, 536 U.S. at 679 (Thomas, J., concurring); *Newdow*, 542 U.S. at 52 (Thomas, J., concurring). An appropriate analysis shifts the inquiry away from the hypothetical neutral observer and refocuses it on the prevention of coercion in order to protect individual liberty. The content of the prayer is irrelevant so long as government power is not used to coerce participation in the prayer.

A. The *Marsh* Test Accurately Reflects The Founders' Understanding Of Establishment, Applied In The Context Of Legislative Prayer

In *Marsh v. Chambers*, this Court held that the Nebraska *legislature's* practice of opening sessions with a prayer by a paid chaplain did not violate the Establishment Clause. 463 U.S. at 784-85 (1983). In defense of the practice, the court cited the weighty historical tradition of legislative prayer that stretches back to the founding. *Id. at* 790. The Constitution's draftsmen did not see legislative prayer as a path to religious establishment, evidenced by their vote to appoint and pay for a chaplain for both hous-

es of Congress in the same week that they voted to approve the draft of the First Amendment for ratification by the states. *Id.* This Court continued by distinguishing legislative prayer from the concept of establishment by noting that it the prayer is "simply a tolerable acknowledgement of beliefs widely held among this country." *Id.* at 792.

The *Marsh* Court's understanding of establishment is one that aligns with the original understanding of "establishment." Like other governmental acknowledgments of this country's rich religious heritage, legislative prayer is not coercive and therefore does not establish religion. Rather, it recognizes, as Justice Douglas did in *Zorach v. Clauson* that "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Thus, the Establishment Clause "[D]oes not compel the government to purge from the public sphere all that in any way partakes of the religious." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring).

B. There Can Be No Establishment in the Absence of Government Coercion of the Individual or Interference with the Religious Organization

The *Lemon*/Endorsement test is a failed experiment in expanding the Establishment Clause in a manner that ultimately defeated the purpose of protecting individual rights in religion. Instead of protecting against coercion of individuals or government interference in ecclesiastical decisions, the test has been used as a weapon in a campaign to purge religion from the public square. The time has come to return to the original understanding of the First

Amendment as a protection for individual freedom of religion.

The appropriate standard for judging whether a government action interferes with the individual freedom of religion protected by the Establishment Clause will focus on preventing governmental interference and coercion. Such a test must proscribe "actual legal coercion," *Newdow*, 524 U.S. at 52 (Thomas, J., concurring), such as "coercion of religious orthodoxy...under force of law or threat of penalty, *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J..dissenting). If the power of government is not used coercively to compel adherence to a particular belief or support of a particular church, there is no establishment.

At the same time, the Court's test must continue to prevent government interference in ecclesiastical decisions. Government, for example, cannot be allowed to interfere in the selection of ministers. *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, __ U.S. __, 132 S.Ct 694, 703 (2012). Nor can government dictate mode or content of worship and prayer to which individuals and churches must adhere. *See Engel v. Vitale*, 370 U.S. 421, 425 (1962).

Under this test, the content of a prayer is irrelevant. So long as the government entity is not using its power to coerce participation or adherence, there is no constitutional command that the prayer be devoid of religious content. In instances of prayers delivered by private individuals chosen by lottery, as in this case, any requirement that government police the content of the prayer is itself a violation of the Religion Clause. The Constitution is not offended by the mention of religion or even any particular reli-

gion. Instead, violation of the Religion Clause lies only in actual government coercion of the individual.

CONCLUSION

The decision below should be reversed and this Court's long-infirm decision in *Lemon* should be finally laid to rest.

DATED: August, 2013.

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AMICUS CURIAE BRIEF

No. 12-696

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TOWN OF GREECE,
Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* THE CENTER FOR INQUIRY, AMERICAN ATHEISTS, AMERICAN ETHICAL UNION, AMERICAN HUMANIST ASSOCIATION, AMERICANS FOR RELIGIOUS LIBERTY, INSTITUTE FOR HUMANIST STUDIES, MILITARY ASSOCIATION OF ATHEISTS AND FREETHINKERS, SECULAR STUDENT ALLIANCE, SECULAR COALITION FOR AMERICA, AND SOCIETY FOR HUMANISTIC JUDAISM, IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST [1]

This *amici curiae* brief in support of Respondents is being filed on behalf of the Center for Inquiry ("CFI"), American Atheists, the American Ethical Union, the American Humanist Association, Americans for Religious Liberty, the Institute for Humanist Studies, the Military Association of Atheists and Freethinkers, the Secular Coalition for America, the Secular Student Alliance, and the Society for Humanistic Judaism. *Amici* are secular and humanist organizations that advocate on behalf of the separation of church and state and offer a unique viewpoint concerning the importance of religious freedom in the United States.

CFI is a nonprofit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

The American Humanist Association advocates for the rights and viewpoints of humanists and works to defend the separation of church and state. Founded in 1941 and headquartered in Washington, D.C., its work

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[1] The parties have given blanket consents to the filing of *amicus* briefs; their written consents are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

is extended through more than 120 local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity.

Americans for Religious Liberty ("ARL") is a nonprofit educational organization, founded in 1982, dedicated to defending religious freedom and church-state separation. ARL has been involved in 60 *amicus* briefs and other actions before the United States Supreme Court and lower federal courts.

The Institute for Humanist Studies is a nonprofit organization dedicated to studying the role of nontheistic philosophies of life in contemporary society, and publishing the results of its studies on a regular basis.

The Military Association of Atheists and Freethinkers represents active duty and prior military personnel in all branches of service who protect a nation that does not discriminate on the basis of belief and does not promote one type of belief to the exclusion of all others.

The Society for Humanistic Judaism mobilizes people to celebrate Jewish identity and culture, consistent with a non-theistic philosophy of life. The Society is concerned with protecting religious freedom for all, especially for religious, ethnic and cultural minorities such as Jews, and for those who do not espouse a traditional religious belief, and for ensuring that its members will not be discriminated against by government favoring of theistic religion.

The deliberative-body prayer practice at issue in this case implicates *amici*'s core humanist and secular interests in the separation of church and state. *Amici*

are accordingly deeply invested in preserving appropriately stringent judicial scrutiny of deliberative-body prayer practices pursuant to the First Amendment.

SUMMARY OF ARGUMENT

This Court should not rubber-stamp the Town of Greece's program of sectarian prayer based on its claimed historical pedigree. In Petitioner's view, the Court can "begin and end" its analysis with *Marsh v. Chambers*, 463 U.S. 783 (1983) by "reaffirm[ing] that *Marsh*'s historical analysis governs the constitutionality of legislative-prayer practices." Pet. Br. 12-14; *see also* Beckett Fund for Religious Liberty *Amicus* Br. 3-4, 16-17, 22; State of Ind. et al. *Amici* Br. 4-5; United States Senators Marco Rubio et al. *Amici* Br. 6-7. But *Marsh* cannot bear the weight that Petitioner places on it because the factual and doctrinal foundations of that opinion have been eroded in the thirty years since it was decided. Not only do the distinctly coercive and sectarian prayers at issue here differ significantly from *Marsh*, *see* Resp. Br. 20-48, but experience has shown *Marsh*'s historical analysis of deliberative prayer to be faulty. The Court should accordingly reject the invitation to broadly immunize deliberative-body prayer from scrutiny based on history alone.

First, experience belies *Marsh*'s foundational premise that sectarian legislative-body prayer is essentially a harmless ceremonial practice which harmonizes with our nation's widely held religious beliefs. To the contrary, this country's experience with deliberative-body prayers since *Marsh* has been turbulent and divisive. Deliberative-body prayer can foster exclusion and harassment of minority groups, political disruption, and even violence directed at those who object to state-sponsored religious worship.

Nor does the homogeneous religious landscape quaintly envisioned in *Marsh* exist any longer. The country has grown increasingly diverse in its religious beliefs. This demographic change heightens the danger that—if gone virtually unchecked as Petitioner urges—government-sponsored prayer will lead to further strife and dissension. Searching evaluation of deliberative-body prayers is needed to account for both the recent disturbing experiences with prayer policies and modern shifts in religious demographics that may exacerbate conflict.

Second, the view that *Marsh* broadly shields deliberative-body prayer from meaningful challenge based on history cannot be reconciled with more recent Establishment Clause precedent. None of this Court's decisions since Marsh has insulated government sponsorship of prayer or other religious expression based solely on history. The Court has pointedly rejected the argument that history insulates school prayer from challenge. It has likewise employed a careful, context-specific review to assess even religious displays deemed "passive," rather than validating the displays based on historical practices. There is no basis to apply a more perfunctory, history-based analysis to deliberative-body prayer. To the extent *Marsh* can be read otherwise, it should have no application outside its own facts.

Evaluated under any of the more rigorous Establishment Clause principles that this Court has regularly employed after *Marsh*, Greece's prayer practice fails to measure up. It is not neutral: Greece picks only clergy to make opening prayers without any real opportunity for non-theists to speak. Even among clergy, it has selected almost exclusively Christians to lead prayers. It is coercive: local citizens, including

local school children, are invited or required to attend Board meetings to conduct their business, to participate in governmental affairs, and to earn school credits. And it unabashedly endorses religion: Greece does nothing to insulate itself from actual or perceived sponsorship of the religious messages delivered by those clergy whom the government selects. Even history, to the extent it is considered among other factors, does not support the constitutionality of Greece's program. Proponents of a prayer policy first enacted in 1999 to replace a secular moment of silence cannot rightly take shelter beneath the mantle of history. The Court should accordingly affirm.

ARGUMENT

I. RECENT EXPERIENCE UNDERMINES THE FACTUAL ASSUMPTIONS UNDERLYING *MARSH*

A. Deliberative-Body Prayers Are a Source of Religious Conflict and Division

In the three decades since *Marsh*, deliberative-body prayer practices have led to harassment of minority groups, sparked violence, distorted local political processes, and otherwise deeply divided communities. The nation's experience with such potentially divisive practices proves faulty the notion that history should immunize deliberative-body prayer from challenge.

Marsh's historical analysis yielded the conclusion that the prayer at issue was an essentially harmless, symbolic practice which harmonized with, rather than threatened to disrupt, society. After surveying historical practices, *Marsh* opined that "the practice of opening legislative sessions with prayer has become part of the fabric of our society." 463 U.S. at 792. *Marsh* then concluded that the "unbroken practice" of

national and state legislative prayer "gives abundant assurance that there is no real threat while this Court sits." *Id.* at 795 (internal quotation marks omitted).

But experience since *Marsh* disproves the assumption that sectarian deliberative prayer poses no threat. Deliberative-body prayer presents a very real and serious risk of breeding religious animosity and division.

1. Deliberative-body prayer practices frequently lead to backlash and ridicule of those who practice a minority faith, or no faith at all. Just this year, after an atheist member of the Arizona House of Representatives offered the daily prayer, a fellow lawmaker asked colleagues to join in "repentance"; about half of the legislature obliged. Bob Christie, *Arizona House Non-prayer Sparks Christian Re-do*, Associated Press, May 22, 2013. The lawmaker compared the atheist's prayer to pledging allegiance to England and remarked that "[w]hen there's a time set aside to pray . . . , if you are a non-believer, don't ask for time to pray." *Id.*

This backlash against the expression of minority views about religion was no isolated occurrence. In Tampa, Florida, three city council members walked out of a meeting rather than hear an atheist speak during a time reserved for prayer. Andy Reid, *3 on Council Snub Atheist's Invocation*, Tampa Tribune, July 30, 2004, at 1. At the Pompano Beach City Commission in Florida, an Imam's prayer created "uproar" as many showed up to "slam commissioners" for allowing the prayer. Linda Trischitta, *Imam's Invocation Sparks Controversy*, Sun Sentinel (Ft. Lauderdale, Fla.), May 17, 2010, at 1B. In Washington, a state representative left chambers when a Muslim cleric led the prayer, declaring her boycott "patriotic." David Potsman & Sarah Lorenzini,

Protest over Muslim Prayer Nothing New for Legislature, Seattle Times, Mar. 5, 2003, at A1. And in the U.S. Senate, when a Hindu clergyman gave the morning prayer for the first time, a group of spectators shouted in protest from the gallery that "this is an abomination." *Senate Prayer Led by Hindu Elicits Protest*, Associated Press, July 13, 2007.

2. Those who express opposition to deliberative-body prayers have been repeatedly subjected to threats or violence. In Florida, the home of a Jewish family was vandalized with red paint on Passover after the family sued the Manatee County School Board for opening each meeting with the Lord's Prayer. Robert Patrick & Laura Green, *Rosenauers' Home, Truck Vandalized*, Sarasota Herald Tribune, Apr. 13, 2004, at A1. Later testifying before Congress, the father stated that his family "received anonymous threatening phone calls . . . telling us we should move out of the country if 'we didn't like the way they do things here,' and . . . that . . . '[w]e know where you Jews live and if you don't drop the lawsuit there will be trouble.'" *Beyond the Pledge of Allegiance: Hostility to Religious Expression in the Public Square: Hearing Before the Subcomm. on the Constitution, Civil Rights and Prop. Rights of the S. Comm. on the Judiciary*, 108th Cong. 19 (2004) (statement of Steven Rosenauer). In South Carolina, a Wiccan high priestess who challenged the prayer policy of the Great Falls Town Council had her property repeatedly vandalized, her house broken into, and her pet mutilated with a note attached to its back threatening, "You're next!" Denyse Clark, *High Priestess Took Chester County Town to Court*, Herald (Rock Hill, S.C.), Aug. 16, 2005, at 1B.

Even in the absence of direct acts or threats of violence, those challenging prayer practices experience

insult and affront. In Virginia, a plaintiff who sued the Pittsylvania County Board of Supervisors over its prayer policy heard a comment about "Jew speak" at a board meeting and received a letter purporting to be from the Ku Klux Klan. *Doe v. Pittsylvania Cnty., Va.*, 844 F. Supp. 2d 724, 740 (W.D. Va. 2012). An Idaho student challenging prayer at Pocatello City Council meetings was called "un-American" by a pastor giving an invocation. Sean Ellis, *Battlelines Drawn in Fight over Invocation*, Idaho State J., Nov. 10, 2010, at A1. In this very case, the plaintiffs were ridiculed as "ignorant" by a prayer-giver at a Town Board meeting after objecting to the practice. Pet. App. 8a.

3. Deliberative-body prayer has also fractured local political processes along religious lines. Before a vote on the prayer policy by the Lodi City Council in California, a "chaplain suggested that if council members didn't vote with Jesus, their decision would be advertised on Lodi billboards." Loretta Kalb, *Public Invocations: Passions Run High in Lodi Prayer Debate*, Sacramento Bee, Oct. 1, 2009, at A1. In North Carolina, two incumbent commissioners on the Yadkin County Board of Commissioners lost their primaries "as part of a backlash over the board's decision to drop sectarian prayer from meetings." Sherry Youngquist, *Issues Led to Defeat of Yadkin Officials*, Winston-Salem J., May 11, 2008. The commissioners' vote against sectarian prayer "brought on the strongest attacks" of any issue in the election. *Id.* Also in North Carolina, a pastor critical of the High Point City Council's vote to disallow sectarian prayer warned that voters would "remember in 2008" and received a "loud standing ovation." Tom Steadman, *Council Votes on Prayer*, Greensboro News & Record, July 17, 2007, at A1. Other local legislators have chosen to resign rather than face the controversy and

division they feared would follow a vote on deliberative-body prayer practices. *E.g.*, Brad Kesler, *Member Resigns from Board, Cites Prayer Issue*, Herald-Sun (Durham, N.C.), May 6, 2013, at A5.

These are just a sampling of instances of deliberative-body prayer practices igniting controversies and dividing communities across the country. Each instance reaffirms that deliberative-body prayer risks intolerable religious conflict within local communities.

"[N]othing does a better job of roiling society" than "the civic divisiveness that follows when the government weighs in on one side of religious debate." *McCreary Cnty., Ky. v. ACLU*, 545 U.S. 844, 876 (2005). The Establishment Clause thus protects against governmental sponsorship of religious practices that create the "potential for divisiveness." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). The "anguish, hardship and bitter strife that could come when zealous religious groups struggle[] with one another to obtain the Government's stamp of approval" is a core danger that the Establishment Clause is meant to guard against. *Engel v. Vitale*, 370 U.S. 421, 429 (1962).

Experience shows that deliberative-body prayers have the potential to foment religious conflict and create societal rifts of the very type the Establishment Clause was meant to avert. Under these circumstances, *Marsh* cannot be read to cloak deliberative-body prayer in virtual immunity from Establishment Clause challenge. The Court must closely scrutinize practices that present such an inherent potential for division and conflict along religious lines.

B. American Society Now Reflects a Wider Diversity of Religious Views

Marsh's historical analysis also is founded on the outdated assumption that the nation's religious views are generally homogeneous, and that the prayer at issue would therefore naturally coincide with the audience's religious views. *Marsh* spoke of opening invocations to legislative sessions as conduct which "harmonize[d] with the tenets of some or all religions." 463 U.S. at 792 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). It then characterized the prayer at issue as "a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* But religious demographics in the United States have drastically changed—and continue to change—since *Marsh* was decided. There is no basis in today's society to presume that deliberative-body prayer practices will widely harmonize rather than conflict with the religious beliefs of community residents.

This change in religious demography has been driven primarily by the rapid rise of the religiously unaffiliated. Pew Research Ctr., *"Nones" on the Rise: One-in-Five Adults Have No Religious Affiliation* 13 (2012), *available at* http://tinyurl.com/NonesRise; *see also* Barry A. Kosmin & Ariela Keysar, *American Religious Identification Survey* 3 (2009), *available at* http://tinyurl.com/KosminKeysar. One-fifth of the U.S. public—and one-third of adults under thirty—do not affiliate with a religion. Pew Research Ctr., *supra*, at 9. These so-called "nones" are now the fastest growing "religious" group in the United States. *Id.* at 13. This growth is also recent; the rise of the religiously unaffiliated did not begin until the 1990s, after *Marsh* was decided. *See id.* at 14; Michael Hout et al., Inst. for the Study of Societal

Issues, Univ. of Cal. Berkeley, *More Americans Have No Religious Preference: Key Findings from the 2012 General Social Survey* 1-2 (2013), *available at* http://tinyurl.com/Houtetal. These "nones" may hold atheistic, agnostic, or their own individual spiritual beliefs. *See* Pew Research Ctr., *supra*, at 22. Overtly sectarian and explicitly denominational prayer does not in any case "harmonize" with the beliefs and consciences of this growing segment of our nation's population.

Minority religious groups have also steadily grown in size in the past two decades. Kosmin & Keysar, *supra*, at 3 tbl.1. Those who adhere to a non-Christian religion now constitute six percent of the U.S. population, Pew Research Ctr., *supra*, at 13, and their ranks are projected to increase. By 2030, for instance, the percentage of Muslims in the United States is expected to double—making Muslims roughly as numerous as Jews or Episcopalians today. Pew Research Ctr., *The Future of the Global Muslim Population* 15, 141 (2011), *available at* http://tinyurl.com/MuslimFuture. The United States is considered one of the most religiously diverse nations in the world. Todd M. Johnson & Brian J. Grim, *The World's Religion in Figures: An Introduction to International Religious Demography* 101-03 & tbls. 3.7, 3.8 (2013). It will only become more diverse in the years to come.

As a result, the world in which *Marsh* deemed legislative prayer "a tolerable acknowledgment of beliefs widely held among the people of this country," 463 U.S. at 792, does not exist today. In recent years, deliberative-body prayer practices have proved deeply divisive, and that trend is bound to continue as communities include more residents who adhere to

minority religions, are atheist or agnostic, or hold individual religious beliefs not affiliated with any organized religion. Petitioner's argument that *Marsh* should shield deliberative-body prayer practices from genuine scrutiny ignores these realities.

II. ESTABLISHMENT CLAUSE PRECEDENT SUBSEQUENT TO *MARSH* DOES NOT SUPPORT IMMUNIZING DELIBERATIVE-BODY PRAYER BASED ON HISTORY ALONE

The last three decades of Establishment Clause jurisprudence undermine any claim that historical practices are virtually the sole guidepost by which to measure the constitutionality of deliberative-body prayer. In light of that precedent, *Marsh* cannot be read as Petitioner and its *amici* urge as a blanket authorization of deliberative-body prayer.

While this Court has not addressed legislative prayer since *Marsh*, it has frequently analyzed claims of state-sponsored religious expression in the analogous contexts of prayers in public schools and religious displays. Yet no opinion of this Court has relied on *Marsh* to validate such religious expression under the Establishment Clause based on historical pedigree alone. To the contrary, the Court has repeatedly struck down the state-sponsored expression of religious views irrespective of their historical acceptance. And when the Court has found such practices compatible with the Establishment Clause, it has done so only after reviewing them under a careful, context-specific inquiry—not a history-based rubber-stamp.

1. The Court has consistently scrutinized school prayers with a careful eye, despite dissenters'

repeated arguments about their long historical acceptance. In three cases post-dating *Marsh*, the Court has evaluated school prayer practices, and held all three unconstitutional. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (prayer at school football games); *Lee*, 505 U.S. 577 (prayer at school graduation ceremony); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (moment of silence in public schools for meditation or voluntary prayer). In each case, the Court invalidated the law after a searching evaluation that did not depend upon the history of the practice alone.

In *Lee*, for example, the Court held unconstitutional a public school graduation prayer, 505 U.S. at 599, despite vigorous arguments that the practice's history should answer constitutional objections. The dissent characterized such prayers as "a tradition that is as old as public-school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally." 505 U.S. at 632 (Scalia, J., dissenting). The petitioner school principal likewise relied heavily upon historical precedent, arguing that the practice must be permissible because similar "official expressions of religious sentiments" were "freely engaged in and encouraged" since the Founding. Brief for the Petitioners, Lee v. Weisman, 505 U.S. 577 (1992) (No. 90-1014), 1991 WL 527613, at *30-32; *see also id.* at *13-14. The Court nevertheless refused to restrict itself to a solely historical analysis. Explaining that "[o]ur Establishment Clause jurisprudence remains a delicate and fact-sensitive one," the *Lee* Court expressly declined to apply *Marsh* to uphold the prayer at issue. 505 U.S. at 597 (majority opinion).

In *Santa Fe*, the Court was again presented with the "long history of prayer at public gatherings" as a basis for validating a school prayer practice. Brief for Spearman Indep. Sch. Dist. et al. as *Amici Curiae* Supporting Petitioner, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (No. 99-62), 1999 WL 1272950, at *4; *see also* Brief for Marian Ward et al. as *Amici Curiae* Supporting Petitioner, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (No. 99-62), 1999 WL 1269303, at *7-11. And again the Court rejected this historical approach, instead holding that the school had impermissibly "sponsor[ed] the particular religious practice of prayer." 530 U.S. at 313.

History alone should not insulate deliberative-body prayer from meaningful scrutiny any more than it does the school prayer activities found unconstitutional in these cases. It is true that the Court has noted "heightened [Establishment Clause] concerns" with protecting public school children in particular. *See, e.g.*, *Lee*, 505 U.S. at 592 (collecting cases). But this heightened concern does not mean that deliberative-body prayer is so dissimilar as to warrant the back-of-the-hand treatment Petitioner urges here. As the Court remarked in *Lee*, "[t]he considerations we have raised in objection to the invocation and benediction are in many respects similar to the arguments we considered in *Marsh*." *Id.* at 596-97. At bottom, both settings involve an active, state-sponsored religious exercise. Such prayers are a particular concern of the Establishment Clause because "one of the greatest dangers to the freedom of the individual to worship in his own way l[ies] in the Government's placing its official stamp of approval upon one particular kind of prayer." *Engel*, 370 U.S. at 429.

2. Nor has the Court focused exclusively on historical pedigree in the context of religious displays. Members of the Court have characterized such static displays as "passive," suggesting they pose less danger of offending constitutional norms than active religious expression such as prayer. *See Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion); *McCreary*, 545 U.S. at 909 (Scalia, J., dissenting). Yet history has not been the sole criterion by which the Court has analyzed even such "passive" expressions.

In *McCreary*, for example, the Court held unconstitutional a courthouse display of the Ten Commandments. It did so despite some of the dissenters' express argument that the decision was inconsistent with *Marsh*. *See McCreary*, 545 U.S. at 892 (Scalia, J., dissenting) ("Why, one wonders, is not respect for the Ten Commandments a tolerable acknowledgement of beliefs widely held among the people of this country?"). Instead of looking to history, the majority sought to avoid the dangerous consequences that follow when the government takes sides in matters of religion. The Court thus explained, "[t]he Framers and the citizens of their time intended . . . to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate." *Id.* at 876 (majority opinion).

Van Orden's validation of the Ten Commandments monument in that case also did not rely solely or even primarily on a historical analysis of the prevalence of such displays. Justice Breyer's concurrence rejected any "mechanical formula" for drawing the appropriate constitutional line. *See Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment). The plurality opinion, while discussing the role of the Ten Commandments in the nation's history, turned on the

understanding that the display was a "passive monument," *id.* at 686, 692, that had not garnered complaints for a number of years, and that the monument had a "dual significance" that included not only a religious meaning but an expression of the state's "political and legal history." *Id.* at 691-92; *see also McCreary*, 545 U.S. at 903 (Scalia, J., dissenting). Neither consideration is true in the context of the deliberative-body prayers here.

3. Deliberative-body prayer also does not fit within the discrete set of historically permitted, national practices with religious content sometimes included under the rubric of "ceremonial deism." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring in the judgment). Members of the Court have included within the category of such historically-tolerated practices the statement opening this Court's sessions, the Thanksgiving proclamations, and references to divinity in the Pledge of Allegiance and on our currency. *E.g.*, *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment); *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 672-73 (1989) (Kennedy, J., dissenting). Some have suggested that these religious references have gained such a level of acceptance through wide-spread historical usage that they present little danger of fostering religious strife, and that purging all such references would only create greater risk of social conflict. *See, e.g.*, *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment). Others have postulated that such practices are constitutionally valid because they have developed a secular, historical meaning through ubiquitous use over time. *See Elk Grove*, 542 U.S. at 37 (O'Connor, J., concurring in the judgment).

Whatever the merit of these positions, overtly sectarian deliberative-body prayer does not fall within the same category. Deliberative-body prayers have demonstrably and repeatedly led to religious animosity and rifts in local communities. *See supra* Part I. And prayer is a core form of religious expression; there can be no claim that clergy-led sectarian prayers have developed a secular meaning through long use. Prayer also presents an active opportunity for state-sponsored religious indoctrination, unlike a fixed customary phrase or static motto on a coin. Such an incidental or passing reference to the divine bears no resemblance to the state repeatedly sponsoring sectarian prayer as part of its core governmental activities. Programmatic, government-sponsored sectarian prayers such as Greece's therefore should not and cannot broadly be treated as innocuous symbolism, as Petitioner's *amici* urge. *See* United States *Amicus* Br. 10 n.3; Ctr. for Constitutional Jurisprudence *Amicus* Br. 10-12; Va. Christian Alliance et al. *Amici* Br. 16-17.

In sum, this Court's decisions since *Marsh* do not condone casual approval of state-sponsored religious expression on the basis of historical precedent alone. The Court should employ the same careful review to deliberative-body prayer that it used to assess other forms of religious expression in the public sphere.

III. THE TOWN OF GREECE'S PRAYER PRACTICE FAILS EACH PRINCIPLE OF RECENT ESTABLISHMENT CLAUSE ANALYSIS

The Court's Establishment Clause decisions since *Marsh* have not formulaically turned on historical pedigree, but on an analysis guided by one or more of three principles: neutrality, coercion, and endorsement.

Under any of these three modes of analysis, Greece's program of deliberative-body prayer fails to satisfy the Establishment Clause. And it fails to pass muster whether or not the Court parses the content of those prayers, which Petitioner and certain of its *amici* argue to be improper. *E.g.*, Pet. Br. 41-44; Justice and Freedom Fund *Amicus* Br. 8-10; United States Senators Marco Rubio et al. *Amici* Br. 22-30.

1. The prayer program at issue here is not neutral. The "First Amendment mandates governmental neutrality [both] between religion and religion, *and* between religion and non-religion." *McCreary*, 545 U.S. at 860 (emphasis added) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). *Accord Bd. of Ed. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) (A "principle at the heart of the Establishment Clause" is "that government should not prefer one religion to another, or religion to irreligion."); *see Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (describing focus on "neutrality" and private choice in assessing governmental aid programs).

Greece's program is impermissibly skewed to favor religion over non-religion because the mechanism for choosing speakers ensures that only religious viewpoints are expressed. For most of the history of the Town's prayer practice, a series of Town employees were given unguided discretion to identify a "pastor" to give invocations. Resp. Br. 12-13; *see* Pet. App. 4a-5a. The employees adopted a practice of calling organizations or clergy from lists that—as far as any of them can remember—they created solely by reviewing religious organizations included in the Town's "Community Guide" and the "Religious Services Directory" of the Greece Post newspaper. Pet. App. 31a-40a.

Because these lists were created by looking only for religious congregations or organizations, by design they did not and could not include representatives of organizations with non-theistic belief structures. As of the record's closing in June 2010, the Town still had no process for seeking out individuals without religious affiliation to give invocations. Resp. Br. 14; *see* Pet. App. 4a. This systematic exclusion of those whose beliefs about religion are akin to the instant *amici*'s is alone a defect of constitutional magnitude.

By result if not design, Greece's prayer program also discriminates against minority religions. Until 2008, every entry on the employees' lists was a Christian organization or clergy. Resp. Br. 12; Pet. App. 5a. Accordingly, Christian clergy gave every one of the Town's invocations. Pet. App. 4a. And, with the exception of a brief interlude in 2008 when this lawsuit was filed, the Town has continued to have exclusively Christian clergy give invocations. Resp. Br. 13-14; Pet. App. 5a. This too represents a fatal lack of neutrality.

2. The Establishment Clause at a minimum "guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587, 594 (finding prayer at school graduation ceremony improperly "required participation in a religious exercise"). Greece's prayer program also creates an unacceptable risk of coercing participation in religious exercise.

Greece's board meetings are focused towards and connected to the community's residents in a way that differs, for example, from the way that Congress operates. The Town Board regularly invites or requires participation of private citizens at its meetings. Resp. Br. 2-8. In some cases, citizens are required to appear to petition the Board on matters

within its discretionary authority. *Id.* at 5-6. For example, an individual who wants to operate a business or to re-zone property must attend to participate in a hearing. *Id.* The presence—at times mandatory—of local citizenry at these meetings heightens the danger that state-sponsored prayer will exert a coercive influence.

Also unlike some other deliberative bodies, children frequently attend and participate in Town Board meetings, whether to receive an award, to deliver the Pledge of Allegiance, or to obtain class credit. *Id.* at 6-8. This Court has recognized the greater coercive effect a prayer practice has on children, who face heightened social pressure to conform. *Santa Fe*, 530 U.S. at 311-12.

Nor is the coercive pressure of the prayers ameliorated by the notion that those who take offense may simply walk out of the meeting. Particularly in a small setting like a town meeting in which residents may know one another, meeting participants may be very reluctant to publicly reveal their disagreement with the prevailing religious sentiment. Indeed, given the examples of backlash and threats against some who have objected to deliberative-body prayer, *see supra* Part I, such reluctance is understandable. Greece's prayer program thus presents the same risk of "citizens [being] subjected to state-sponsored religious exercises" the Court found intolerable in *Lee*, 505 U.S. at 592.

3. The Town's prayer practice also violates the Establishment Clause prohibition against a governmental practice that "either has the purpose or effect of 'endorsing' religion." *Allegheny*, 492 U.S. at 592; *id.* at 629 (O'Connor, J., concurring in part and in the judgment). In addition to the biased process for

selection of speakers which inherently favors religious expression and Christian prayer in particular, the Town has made no effort to counteract the impression of religious favoritism that its practice conveyed. The Town thus never "publicly solicited volunteers to deliver invocations nor informed members of the general public that volunteers would be considered or accepted, let alone welcomed," Pet. App. 20a, never made "any effort . . . to explain the nature of its prayer program to attendees," *id.* at 22a, nor otherwise took "steps to avoid [its] identification" with the Christian faith. *Id.* at 26a. The Town selected a few token speakers of minority religions only after complaints were made, and then quickly returned to a regime of uniformly Christian clergy-led prayer. *See* Resp. Br. 13-14; Pet. App. 4a-5a. Under these circumstances, a reasonable, objective observer could not help but perceive endorsement of religion generally and of one creed in particular.

4. Finally, if history is to be considered, the most pertinent history here is that of the Town's prayer practice itself. The Town only introduced a prayer to its Board meetings in 1999—overturning its own historical practice of beginning with a moment of silence. Pet. App. 3a. "[I]n today's world, in a Nation of so many different religious and comparable nonreligious fundamental beliefs," this introduction of a new religious practice "prove[d] divisive in a way that [a] longstanding, pre-existing" practice would not. *Van Orden*, 545 U.S. at 703 (Breyer, J., concurring in the judgment). Petitioner's suggestion that the history of other prayer practices necessarily immunizes this one would require the Court to "turn a blind eye to the context in which this policy arose." *Santa Fe*, 530 U.S. at 315.

Viewed in its proper context, the Town's prayer practice runs afoul of each of the principles the Establishment Clause protects, and is therefore unconstitutional.

CONCLUSION

The judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CHAPLAIN ALLIANCE FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The **Chaplain Alliance for Religious Liberty** ("Chaplain Alliance") is an organization comprised of veteran United States military service members, primarily chaplains. As a prerequisite to accepting a chaplain for service in the United States Armed Forces, the United States requires that a chaplain be "endorsed" by a religious organization to then serve as an official representative of his or her faith group. The Chaplain Alliance is an association of endorsing agencies that works to ensure that chaplains can defend and provide for the freedom of religion and conscience that the Constitution guarantees all chaplains and those whom they serve. The Chaplain Alliance has over 25 endorsing agency members.

A chaplain is "a member of the clergy attached to a chapel, legislative assembly, or military unit." *American Heritage Dictionary*, 148 (3d ed. 1992). This definition neatly captures both the spiritual calling and the vocational service that chaplains pursue with respect to their faith and the faith exercised by their audiences. Chaplains have long navigated these forums with civility and sensitivity to First Amendment principles coupled with welcomed acknowledgment of deity in private and public circles.

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[1] The parties' counsel were timely notified of, and consented to, the filing of this brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Chaplains routinely receive requests to pray in connection with governmental proceedings, including legislative proceedings, at military commissioning events, the funerals of service members or other public servants, and other governmentally affiliated occasions. Ordinarily, chaplains offer prayers in the name of, and according to, a chaplain's given religious conviction and creed. A chaplain's independence and discretion to offer prayer enables the chaplain to perform his function fully and faithfully without trepidation and in the spirit of religious expression.

The Chaplain Alliance submits this brief out of concern that the observer-based effects test employed by the Second Circuit places the federal courts in a position of overseeing the "totality of the circumstances" of religious actions and expression conducted in connection with government activities. The chaplaincy provides a contrasting model of a historic, constitutionally permissible accommodation of religion—a model that can and should be applied in the context of legislative prayer.

SUMMARY OF ARGUMENT

The reasoning employed by the Second Circuit in *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012) could imperil the ability of chaplains and other clergy to respectfully and faithfully serve in public settings. In contrast to the Second Circuit's erroneous reasoning, the chaplaincy provides an elegant model, created by the Founders and upheld by the courts, of a respectful accommodation of religious belief—a model whose principles can and should be applied to legislative prayer.

Over the past 250 years, military chaplains of diverse faiths have provided spiritual support to service members of every faith and those of no faith at all, while simultaneously remaining faithful to and open about the particular beliefs of his or her denomination or sect. The reasoning of the Second Circuit would upset this graceful balance. A chaplain cannot fulfill his or her duties with the federal courts looking over one shoulder and the "reasonable observer" looking over the other to assess when a religious activity may make a hypothetical observer feel like an outsider.

In addition, the Second Circuit's ruling effectively compels the very result it purports to avoid, requiring the government to parse the beliefs of various religions and deem some religions acceptable and others unacceptable. This display of favoritism may be averted by simply permitting any prayer giver to pray according to the dictates of his or her conscience, so long as the prayer is not exploited to proselytize or to disparage other religions.

ARGUMENT

I. The Second Circuit's reasoning could be applied with equal force to chaplains.

The Chaplain Alliance submits this brief to express concern with the reasoning used by the Second Circuit in evaluating an Establishment Clause challenge using an observer-based effects test. While the Second Circuit's opinion stated that the *conclusion* was limited to the record before the court, *Galloway v. Town of Greece*, 681 F.3d 20, 30 (2d Cir. 2012), the *reasoning* employed by the court could be applied more broadly. The reasoning was based on the court's "taking into account all of these contextual considerations in concert." *Id.* at 33. The court's reasoning is not delineated in any way that limits it to the practice of offering a religious invocation in connection with a town council meeting. Rather, the reasoning could logically extend to any practice connected to a governmental entity, including the chaplaincy, in which people may "convey their views of religious truth, and thereby run the risk of making others feel like outsiders." *Id.* at 34.

This Court should correct the Second Circuit's erroneous reasoning, and the Chaplain Alliance respectfully submits that the chaplaincy provides an appropriate model for legislative prayer. While the military is a unique institution, *see Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986), the chaplaincy is nevertheless an apt model for legislative prayer. Members of this Court have previously recognized parallels between chaplaincy and legislative prayer. *See, e.g., Lee v. Weisman*, 505

U.S. 577, 625-26 (1992) (Souter, J. concurring) (citing *Marsh v. Chambers* and *Katcoff v. Marsh* in the same sentence and noting that federal courts, under their expansive general view of the Establishment clause, have upheld both legislative and military chaplaincy); *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 297-300 (1963) (Brennan, J. concurring) (noting in successive paragraphs that military chaplaincy and legislative prayer share special First Amendment considerations). Accordingly, just as this Court declined to apply the *Lemon* test to a legislative prayer challenge in *Marsh v. Chambers*, 463 U.S. 783 (1983), courts have declined to apply the *Lemon* test to challenges to the military chaplaincy. *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985).

II. The chaplaincy is a historically recognized accommodation of religious activity and expression in connection with government activities.

From before the founding of our nation until the present time, the military chaplaincy has exemplified a constitutionally permissible governmental accommodation of religious belief. For over 250 years, chaplains have exemplified both spiritual ministry and personal heroism, serving, as the Army Chaplain Corps' motto says, *Pro Deo et Patria*: for God and Country. This centuries-old tradition, created by the Founders and recognized as constitutional by the courts, *Katcoff*, 755 F.2d at 227-28, models a respectful accommodation of religious belief that can and should be applied to legislative prayer.

The chaplaincy as an exemplar of respect for and accommodation of religious observance predates the founding of our nation. In 1758, during the French and Indian War, the state of Virginia created and provided regimental chaplains at the request of Colonel George Washington. *See* Anson Phelps Stokes, *Church and State in the United States*, Vol. 1 at 268 (1950), available at http://archive.org/details/churchandstatein012700mbp (last visited July 31, 2013). These chaplains were not forced to suppress their distinct denominational or sectarian beliefs and practices. Rather, it was known and welcomed that they represented not only the official Church of England, but also minority religions including Congregationalists, Anglicans, Presbyterians, and Baptists. *Id.*; *see also* William J. Hourihan, *Pro Deo et Patria: A Brief History of the United States Chaplain Corps* at 3 (2004).

This spirit of accommodation and pluralism continued in the Revolutionary War. *See* Stokes at 268 (noting that on August 16, 1775, the Virginia Convention required that commanding officers "permit Dissenting clergymen to celebrate divine worship, and to preach to the soldiers"). On July 29, 1775, the Continental Congress authorized pay for chaplains and soon thereafter General George Washington ordered that chaplains be procured for the Continental Army. *Katcoff*, 755 F.2d at 225 (citations omitted).

The accommodation of religious exercise through the chaplaincy was no mere wartime exigency. After the adoption of the Constitution, but prior to the ratification of the First Amendment, the First Congress authorized the appointment of a

commissioned Army chaplain. *Id.* (citation omitted). The timing of this event amply demonstrates that the Founders saw the military chaplaincy, like legislative prayer, as a permissible accommodation of religion. "Congress' authorization of a military chaplaincy before and contemporaneous with the adoption of the Establishment Clause is also 'weighty evidence' that it did not intend that Clause to apply to such a chaplaincy." *Id.* at 232 (citation omitted); *see also Marsh*, 463 U.S. at 790 (noting that in the same week that the First Congress passed the Bill of Rights, it hired a chaplain to pray at its meetings, and the Court could not accept the conclusion that "[m]embers of the First Congress . . . intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable").

The Founders' esteem for the chaplaincy proved prescient. Over the following centuries, the chaplains' corps has served at home and abroad, in war and in peace, nurturing the living, caring for the wounded, and honoring the dead. Their legacy exemplifies the First Amendment ideal that the government should accommodate public religious exercise that is pluralistic and respectful, yet in which a minister may be faithful to his or her own beliefs and denominational distinctives. Chaplains serve *all* in need, not only those of like faith, yet they remain true to their own creeds and callings.

For example, four chaplains of diverse faiths willingly gave their lives in the service of God and Country when the *Dorchester* was torpedoed in 1943. *See The Saga of the Four Chaplains*, available at http://www.fourchaplains.org/story.html (last visited July 31, 2013). As the ship sank, the chaplains—a

Methodist minister, a Jewish rabbi, a Dutch Reformed minister, and a Catholic priest—began to tend the wounded, rescue the trapped, encouraged the frightened, and pray for all. When the supply of lifejackets was exhausted, each chaplain gave his to a young soldier. As the overcrowded lifeboats moved away, witnesses observed the four chaplains with arms linked, saying prayers as the *Dorchester* went down in icy waters. The four chaplains were posthumously awarded the Purple Heart, the Distinguished Service Cross, and the Chaplain's Medal for Heroism—an award created specifically in their memory. *Id.*

In a similar showing of valor, Reverend George S. Rentz, a Presbyterian minister who served as a United States Navy chaplain during both World Wars, served his fellow sailors in life and in death. *See USS Rentz*, available at http://www.public.navy.mil/surfor/ffg46/Pages/ourShip.aspx (last visited July 31, 2013). In one engagement, while his ship was under severe aerial attack, Rentz spurned cover to encourage the men, prompting a fellow officer to note that "when the sailors saw this man of God walking fearlessly among them, they no longer felt alone." *Id.* In a subsequent battle, after his ship was sunk, Rentz found himself and others clinging to wreckage inadequate to keep the survivors afloat. In an act of personal heroism and spiritual significance, he ordered a young seaman to take his lifejacket, said a prayer, and then quietly abandoned the float. *Id.* For his selfless act, Chaplain Rentz was posthumously awarded the Navy Cross—the Navy's second highest award for valor—and the United States frigate *USS Rentz* was named in his honor.

On D-Day, June 6, 1944, Catholic chaplain Francis L. Sampson, known as the "paratrooper padre," was the first chaplain to take part in the invasion of France when he parachuted behind enemy lines with the 101st Airborne Division. *See Sampson, Francis L.*, Des Moines Register, Feb. 4, 2008, available at http://www.desmoinesregister.com/article/99999999/FAMOUSIOWANS/712160326/Sampson-Francis-L- (last visited July 31, 2013). Father Sampson landed in a river, into which he then dove repeatedly in order to retrieve his Mass kit. *Id.* He was captured twice by the enemy, cared for his fellow captives, later served in the Korean War and as the Army Chief of Chaplains, and after retirement, served American troops in Vietnam. *Id.*

In April 2013, President Obama awarded the Medal of Honor posthumously to Catholic Chaplain Emil Kapaun for his service and sacrifice during the Korean War. *See Medal of Honor Recipient Chaplain (Capt.) Emil J. Kapaun*, available at http://www.army.mil/medalofhonor/kapaun (last visited July 31, 2013). Chaplain Kapaun exposed himself to enemy fire to care for wounded soldiers and drag them to safety. He refused opportunities to escape from the enemy so he could continue to provide care to fellow prisoners, and he provided spiritual, physical, and moral support to his fellow captives, despite continuous and harsh punishment from his captors. *Id.* One of his last acts was to conduct a forbidden Easter sunrise service for his fellow captives. *Id.*

As illustrated by the foregoing examples, although chaplains serve one of the most religiously diverse organizations in the world, they are not

generic "religious" officers. Rather, they are representatives of specific faith groups.[2] *In re England*, 375 F.3d 1169, 1171 (D.C. Cir. 2004) (noting that chaplains serve simultaneously as "a professional representative of a particular religious denomination and as a commissioned officer"); *accord* United States Army Regulation 165-1, Army Chaplain Corps Activities ("Army Reg. 165-1") § 4-3(a) ("Army chaplains have a dual role as religious leaders and staff officers."), available at http://www.chapnet.army.mil/pdf/165-1.pdf (last visited July 31, 2013).

The chaplaincy thus accommodates the religious pluralism of the American population and simultaneously respects and allows the distinct religious beliefs of the clergy from various faiths. Thus, the chaplaincy stands as an example of a permissible governmental acknowledgment of religion and public religious exercise. This venerable tradition, which mirrors the rule of *Marsh v. Chambers*, models a respectful accommodation of religious belief that can and should be applied to legislative prayer.

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[2] For example, as noted above, Chaplain Sampson parachuted into Normandy with the liturgical items needed to administer Catholic Mass. Likewise, Chaplain Kapaun's final act before his death as a prisoner of war was to conduct a forbidden Easter sunrise service, a liturgy celebrated only by Christian denominations.

III. The Second Circuit's reasoning, if applied in the context of the chaplaincy, would compel chaplains to abstain from their religiously-compelled ministries.

As discussed in the briefs of Petitioner and other *amici*, our nation has a long-standing history of public prayer and other forms of religious acknowledgment and accommodation. The ongoing vitality and workability of this time-tested tradition is demonstrated by the military chaplaincy, whose policies and practices demonstrate an elegant balance of accommodating the belief or unbelief of every service member while simultaneously acknowledging and respecting each chaplain's spiritual beliefs, denominational distinctives, and dictates of conscience.

A. Chaplains provide services to those of diverse faiths but are free to perform these religious duties consistent with their own faiths.

Every chaplain is duty-bound to respectfully provide for the religious needs of all service members, including those who do not share the chaplain's beliefs and those who oppose his beliefs. But chaplains must, as a matter of both law and conscience, make this provision while remaining distinct representatives of their faith groups—representatives who teach, preach, counsel, and advise in accordance with the tenets of their religious beliefs and doctrines. To protect a chaplain's role as a faith group representative, and thereby the chaplain's usefulness to the military, Congress and the military have crafted safeguards to keep chaplains from being forced to engage in ministry

activities that violate their faith group's beliefs. *See, e.g.*, 10 U.S.C. § 6031(a) ("An officer in the Chaplain Corps may conduct public worship according to the manner and forms of the church of which he is a member.") (statute for Navy chaplains); U.S. Air Force Instruction 52-101 § 2.1 ("Chaplains do not perform duties incompatible with their faith group tenets."), available at http://static.e-publishing.af.mil/production/1/af_hc/publication/afi52-101/afi52-101.pdf (last visited July 31, 2013); Army Reg. 165-1 § 3-5(b) ("Chaplains are authorized to conduct religious services, rites, sacraments, ordinances, and other religious ministrations as required by their respective faith group. Chaplains will not be required to take part in religious services, rites, sacraments, ordinances, and other religious ministrations when such participation would be at variance with the tenets of their faith."), available at http://www.chapnet.army.mil/pdf/165-1.pdf (last visited July 31, 2013).[3]

The United States Army explains this distinction under the rubric "Perform or Provide." *See* Army Reg. 165-1 § 2-3(b)(1) (noting the obligation of chaplains to "[p]erform or provide religious support that meets the spiritual and religious requirements of the unique military culture"). Under this rubric, a chaplain must "provide" religious resources to any service member who requests such resources,

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[3] This commitment to protecting the ability of service members and chaplains to serve their country without denying their faith was embodied recently in the passage of a law mandating the broad accommodation of religious belief. *See* Authorization Act for Fiscal Year 2013 § 533, Pub. L. No. 112-239 (section entitled "[p]rotection of rights of conscience of members of the Armed Forces and chaplains of such members.").

regardless of the service member's faith tradition. *Id.* § 3-2(a) ("All Chaplains provide for the nurture and practice of religious beliefs, traditions, and customs in a pluralistic environment to strengthen the spiritual lives of Soldiers and their Families.") For example, if a Hindu soldier asks a Christian chaplain for materials for a Hindu ceremony, the chaplain's duty is to provide the requested resources. Similarly, if the Hindu soldier requests moral counseling, the Christian chaplain will fulfill that need.

However, a chaplain is not required to "perform" religious acts that violate his own religious beliefs. *See id.* at 305(b) ("Chaplains will not be required to take part in religious services, rites, sacraments, ordinances, and other religious ministrations when such participation would be at variance with the tenets of their faith."); *id.* § 3-2(b)(3) ("Chaplains will perform their professional military religious leader ministrations in accordance with the tenets or faith requirements of the religious organization that certifies and endorses them.") (citing Dept. of Def. Directive 1304.19); *see also* 10 U.S.C. § 6031(a) ("An officer in the Chaplain Corps may conduct public worship according to the manner and forms of the church of which he is a member.") (statute for Navy chaplains); Air Force Instruction 52-101 § 2.1 ("Chaplains do not perform duties incompatible with their faith group tenets."), available at http://static.e-publishing.af.mil/production/1/af_hc/publication/afi52-101/afi52-101.pdf (last visited July 31, 2013). Therefore, using the above example, if the Hindu soldier requests that the chaplain perform a Hindu ceremony or give religious counsel under the tenets of the Hindu faith, the chaplain is duty-bound and conscience-bound to decline. In fact, as referenced

above, a chaplain who violates the beliefs of his endorsing religious organization by performing the ecclesiastical functions of other religions jeopardizes his status as a chaplain.[4] *See* Dept. of Def. Instruction 1304.28 § 6.5 (stating that the process for separating the chaplain from service begins "immediately" upon the endorser's withdrawal of endorsement), available at http://www.dtic.mil/whs/directives/corres/pdf/130428p.pdf (last visited July 31, 2013).

In sum, the military chaplaincy strikes a graceful and constitutional balance, recognizing the benefit of invoking divine aid and seeking divine wisdom, accommodating the wide diversity of belief and unbelief among the military population, providing chaplains representing a wide spectrum of various beliefs, yet still respecting the spiritual obligations and beliefs of each chaplain and faith group.

B. The Second Circuit's reasoning based on the interpretation of an outside observer is unworkable.

The Second Circuit's reasoning was based on the presumption that the interpretation of a "reasonable observer" is a more reliable arbiter of a governmental

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[4] Because the military has neither the authority nor competence to determine whether an individual qualifies as a representative of a particular religious group, it relies on each specific faith group to endorse chaplains to act as its representatives to the members of that faith serving in the Armed Forces. *See* Dept. of Def. Instruction 1304.28 § E2.1.7. If a chaplain ever ceases to represent his religious organization faithfully, the organization can rescind its endorsement, at which point the chaplain ceases to be a chaplain and must separate from the military. *Id.* at § 6.5.

entity's affiliation with religion than whether a person has the liberty to accept, reject, or ignore a religious practice or expression. *See Galloway*, 681 F.3d at 34 (relying on the potential perception of a hypothetical observer rather than the town council's actions or stated purpose and stating that "a legislative prayer practice that, however well-intentioned, conveys to a reasonable objective observer under the totality of the circumstances an official affiliation with a particular religion violates the clear command of the Establishment Clause."). Invoking the ostensibly even-handed concept of "totality of the circumstances," the Second Circuit has set forth mandatory judicial micromanagement of the religious observance of individuals who participate in governmental activities, to manage "the risk of making others feel like outsiders." *Id.*[5]

If applied to a chaplain, this observer-based effects test would be unworkable because it would uproot and replace the source of the chaplain's ministry obligations. As set forth above, a chaplain's guiding principles issue from the long-established dual duty to the entity or agency the chaplain serves and to the dictates of his faith and endorsing religious organization. Under the Second Circuit's

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[5] Contrary to well-established precedent that the courts should not parse the content of particular prayers, *see Marsh*, 486 U.S. at 795, the "totality of the circumstances" scope of review in the Second Circuit's observer-based effects test expressly requires courts to review the content of prayers. *See Galloway*, 681 F.3d at 30 (citing "several considerations" supporting the Second Circuit's conclusion, "including the prayer-giver selection process, *the content of the prayers*, and the contextual actions (and inactions) of prayer-givers and town officials.") (emphasis added).

reasoning, however, a person engaged in religious service to those participating in local government must tailor his or her service to suit the preferences of the non-existent "reasonable observer." A chaplain's criteria for performance of his or her duties would no longer be mandated by the dictates of the chaplain's conscience, but would become subject to the considerations of any number of third parties who are not followers of the chaplain's faith.

A chaplain cannot fulfill his or her duties with the federal courts looking over one shoulder and the "reasonable observer" looking over the other to assess when a religious activity may make a hypothetical observer feel like an outsider.

In addition, under the Second Circuit's reasoning, it appears that what constitutes an "ordinary, reasonable observer" is also subject to judicial determination according to the totality of the circumstances. Therefore, not only would a chaplain have to conform his religious ministry to the preferences of a third party who is not a member of his faith, but he must constantly bear in mind how a "reasonable observer" would be adjudicated by the court.

The elusive "reasonable observer" necessarily changes with the preferences of society. However, in most recognized faith traditions, the doctrines and practices of the faith do not change with the preferences of society. Therefore, as the preferences of society change over time, a gap develops between the requirements to which a chaplain is held by his faith and the boundaries of ministry established by the reasonable observer of the day. It is

inappropriate to force a contemporary "reasonable observer" standard, which necessarily will change with cultural developments, onto the practices of faith traditions that have been carried on for hundreds or even thousands of years.

C. A principled understanding of the Establishment Clause must be grounded in our Nation's enduring practice of religious accommodation.

In its assessment of the Town of Greece's invocation practice, the Second Circuit relied on the observer-based effects test of *Cnty. of Allegheny v. Am. Civ. Liberties Un. Greater Pittsburgh Ch.*, 492 U.S. 573 (1989). That test, which evaluated religious actions or expressions through the lens of a non-existent "reasonable observer," is a failed experiment unique to the past thirty years of federal court jurisprudence, making it known only to contemporary generations.

By contrast, for the entire duration of our nation's history there has been an accepted practice of public prayer and religious acknowledgment and accommodation. A principled approach to the Establishment Clause cannot dismiss history and must focus on whether religious liberty is implicated by the challenged practice. From the earliest days of this nation, the Founders recognized that religious beliefs and practices were a way of life for the American citizenry. The Establishment Clause, in conjunction with the Free Exercise Clause, was created to protect individual liberty by preventing the newly formed federal government from requiring individuals to adhere to any particular faith or

practice. It did not "disestablish" religion,[6] and it was not created to prevent those participating in government activities from expressing their beliefs or participating in religious activities, such as public prayer. Rather, the First Amendment preserved and protected the status quo in which prayer, in connection with government proceedings or activities, was a common and accepted practice. In this sense of preserving the status quo, the First Amendment paralleled the Seventh Amendment provision that "[i]n suits at common law . . . the right of trial by jury shall be preserved."

An inquiry focused on liberty rather than on the sensitivity of the hypothetical observer allows the courts to make an objective assessment of the observers' autonomy to accept, reject, or ignore the prayer, and it insulates the courts from the perilous task of making a judgment about the propriety or benefits of the religious expression and gauging the unknowable effect on the observer. However, the observer-based effects test has clouded Establishment Clause jurisprudence with a subjectivity requirement that inappropriately requires the courts to determine the type and extent of permissible religious actions or expressions. The test should assess whether the practice at issue compels individual participation, not whether a

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[6] *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2109 (2003) ("Contrary to popular myth, the First Amendment did not disestablish anything. It prevented the newly formed federal government from establishing religion or from interfering in the religious establishments of the states. The First Amendment thus preserved the status quo.")

person "feels like an outsider." If a person has the liberty to accept, reject, or ignore the public expression, the expression establishes nothing.

Like legislative prayer, the courts have specifically upheld the constitutionality of the military chaplaincy program. *See, e.g., Katcoff*, 755 F.2d 223. Nevertheless, this Court has rejected the "strict scrutiny" of an alleged First Amendment violation in the military context, allowing the military greater leeway to restrict the religious practices of service members. *Goldman*, 475 U.S. at 507. If the Court upholds the Second Circuit's reasoning, it would be a foreseeably small step from judicial oversight of prayer in connection with government proceedings to similar oversight of chaplains, placing time-honored traditions, beliefs, and practices aside in favor of the contemporary "reasonable observer."

Our nation's effort to accommodate service members' religious needs has been remarkably successful and "follows the best of our traditions." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952) (praising the State's efforts to accommodate, and thus respect, the "spiritual needs" of citizens). This affirmation of the validity of accommodating public religious practice and expression is a long-standing principle that has never been overturned and has been quoted and reaffirmed countless times in First Amendment jurisprudence, both before and after the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the "endorsement test" of *Lynch v. Donnelly*, 465 U.S. 668 (1984), and the Second Circuit's observer-based

effects test in this case.[7] As recently as June 2012, this Court and the federal circuit courts of appeals have repeatedly cited *Zorach* in numerous contexts to reaffirm the constitutionality of accommodating citizens' private religious needs and concerns. *See, e.g., Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (state could, as part of federal program for the disabled, provide sign language interpreter for deaf student at Catholic high school); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145-46 (1987) (accommodating employee's religious practice of not working certain scheduled hours because of religious convictions did not violate Establishment Clause); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (exempting religious organizations from Title VII's prohibition on religious discrimination is constitutional religious accommodation); *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664 (1970) (state tax exemptions for real property held by religious organizations and used for worship did not violate Establishment Clause); *Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599 (4th Cir. 2012) (relying heavily on *Zorach* in upholding a "released time" program of religious instruction for public school academic credit as a valid accommodation of religion).

However, a ruling by this Court that prayer conducted in connection with a governmental entity is subject to review based on whether it may be

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[7] Even though the Second Circuit did not state that it was applying the endorsement test, the substance of the Second Circuit test and the language used to describe it are essentially identical to the endorsement test.

offensive to an outside observer would upset this history of accommodation. The Establishment Clause is no basis for a constitutional claim by an individual who claims to be offended by the acts of other individuals while participating in government activities. Taking offense over what a person sees or hears should not give rise to a constitutional claim in any context and is not evidence of government establishment. Public acknowledgment of religion, whether in invocations of divine guidance or in the activities of a chaplain, pose no threat to religious liberty and are consistent with a principled understanding of the Establishment Clause and its history.

D. The historical analysis of *Marsh v. Chambers* is the appropriate standard.

Contrary to the observer-based effects test applied by the Second Circuit, the appropriate standard for assessing the constitutionality of the Town of Greece's prayer practice is the historical analysis of *Marsh v. Chambers*. In *Marsh*, decided twelve years after creation of the three-part *Lemon* test, this Court upheld the Nebraska Legislature's practice of beginning each of its sessions with a prayer by a chaplain paid by the State with the legislature's approval. 463 U.S. at 795.

Chief Justice Burger wrote the majority opinions for the Court in both *Lemon* and *Marsh*. In *Lemon*, Chief Justice Burger alluded to the history of the historical motivations behind the "Religion Clauses of the First Amendment" and zeroed in on the word "respecting" in the Establishment Clause, finding that "[a] given law might not establish a state

religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." 403 U.S. at 612. Twelve years later, again writing for the Court in *Marsh*, Chief Justice Burger disregarded his own *Lemon* test in the context of legislative prayer. Instead, *Marsh* directly analyzed the Establishment Clause and the historical setting in which it was created (the same historical setting to which Chief Justice Burger alluded in *Lemon*), this time concluding that "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress-their actions reveal their intent." *Id.* at 790. In analyzing the original intent of the Establishment clause, the Court described the practice of opening each legislative session with an invocation as "deeply embedded in the history and tradition of this country." *Id.* at 786.

Based on this historical analysis, *Marsh* established simple rules for assessing the constitutionality of a legislative prayer practice in the face of an Establishment Clause challenge. The Court rejected the idea that allowing prayer in a legislative context showed a preference to the prayer-giver's religious views, *id.* at 793, held that legislative prayer is allowed except where "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief," *id.* at 794-95, and held that courts should not parse the content of particular prayers, *id.* at 795.

Multiple federal circuit courts of appeals have reached the same conclusion as *Marsh*. For example, in *Pelphrey v. Cobb Cnty.*, the Eleventh Circuit followed *Marsh*, holding that "courts are not to evaluate the content of [legislative] prayers absent evidence of exploitation" and refusing to read *County of Allegheny* "narrowly to permit only nonsectarian prayer." 547 F.3d 1263, 1271 (11th Cir. 2008).

In *Rubin v. City of Lancaster*, the Ninth Circuit held that the proper analysis did "not pivot on the practice's effect on the disapproving listener." 710 F.3d 1087, 1096 (9th Cir. 2013). The Ninth Circuit went so far as to state that the Second Circuit's ruling in *Galloway v. Town of Greece* did not apply the proper analysis under *Marsh*. *Id.* at 1095 (recapping the Second Circuit's analysis and stating "[w]e read *Marsh* to require a different inquiry.")

Most recently, in *Jones v. Hamilton Cnty. Gov't, Tenn.*, --- Fed. Appx. ----, No. 12-6079, 2013 WL 3766656 (6th Cir. July 19, 2013), the Sixth Circuit declined to apply the *Lemon* test in the context of legislative prayer and found that a county's prayer policy was constitutional. *Id.* at *9-12. Rather than resorting to a subjective observer-based effects test, the Sixth Circuit applied *Marsh*'s principle that legislative prayer is allowed except where "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at *9 (quoting *Marsh*, 463 U.S. at 794-95).

Marsh and its progeny properly balance accommodation of religion with establishment of religion by permitting the historic practice while

refusing to pass judgment on the content of the prayers. The government avoids Establishment Clause concerns by ensuring that everyone is free to accept, reject, or ignore the counsel of a chaplain without reprisal or penalty.

Similarly, the *Marsh* historical analysis exemplifies that, like the military chaplaincy, legislative prayer is a special context. As mentioned above, members of this Court have previously recognized parallels between chaplaincy and legislative prayer. If one of these contexts becomes subject to a "totality of the circumstances" judicial review every time a third party feels alienated, it is only a small step to apply that reasoning to the other context. If the Court upholds the Second Circuit's observer-based effects test in the context of legislative prayer, the same test could be applied to the chaplaincy with devastating effects to a chaplain's duties.

IV. The Second Circuit's reasoning requires the State to pick and choose between religions and causes an even greater degree of state entanglement.

In an attempt not to prefer one religion over another, the Second Circuit does just that by establishing a brand of civic religion to the exclusion of others. As a result, the Second Circuit's reasoning effectively compels the State to establish preferred religions or religious beliefs.

A. The Second Circuit's reasoning discriminates between religions by effectively outlawing core tenets of some religions and not others.

The Second Circuit's ruling favors one religion over another in two distinct ways. First, the Second Circuit expressed that, to avoid an Establishment Clause violation, the town should have ensured that the prayer givers employ "references unique to some other faith [other than Christianity]." *Galloway*, 681 F.3d at 31. Under the Second Circuit standard, something less than "most of the prayers" may contain "Christian references." *Id.* Second, the observer-based effects test used by the court favors those religious and non-religious beliefs that would not put a non-adherent in an "awkward position." *Id.* at 32. By effectively favoring some religions over others, the Second Circuit institutes the very thing this Court sought to avoid in *Marsh*. Specifically, the *Marsh* Court noted that legislative prayer could not be "exploited to advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 795.

Requiring a chaplain, or any clergy, to pray in a "non-sectarian" or more inclusive manner not only runs afoul of *Marsh*, but also mandates government orthodoxy, a concept that this Court has long disavowed under First Amendment principles. As this Court stated:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by

> word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

W. Va. State Bd. of Ed. v. Barnette, 319 U.S. 624, 640 (1943); *see also Larson v. Valente*, 456 U.S. 228, 244 (1982) (stating discriminating between religions violates "[t]he clearest command of the Establishment Clause"). Indeed, the government, and particularly the judiciary, is ill-equipped to assuming the role of "ecclesiastical arbiter." *See County of Allegheny*, 492 U.S. at 678 (Kennedy, J. dissenting) ("This Court is ill-equipped to sit as a national theology board."); *Pelphrey*, 547 F.3d at 1272 (noting the practical difficulties in drawing the line between "sectarian and nonsectarian expressions").

Nevertheless, the reasoning adopted by the Second Circuit, under the guise of avoiding entanglement with religion, threatens to place the courts in a position of parsing the beliefs of various religions and deeming some religions acceptable and others unacceptable. This is precisely the "particularly perverse result" that courts have sought to avoid. *See Weisman*, 505 U.S. at 581 ("It is a cornerstone principle of our Establishment Clause jurisprudence that '*it is no part of the business of government* to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government.'") (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)) (emphasis added). Indeed, the government is without "any power to prescribe by law any particular form of prayer which to be used as an official prayer in

carrying on any program of governmentally sponsored religious activity." *Engel*, 370 U.S. at 430.

In *Town of Greece* and similar situations, the effect of the Second Circuit's reasoning is to suppress the more traditional or exclusive religions and favor the more progressive or ecumenical religions. *See, e.g.*, *Joint Statement of Southern Baptist Concern on Religious Liberty and the United States Military* at 3, May 6, 2013, available at http://www.namb.net/WorkArea/DownloadAsset.aspx?id=12884902744 (last visited July 31, 2013) (noting concern over "the ongoing struggles for evangelical Christian chaplains to pray in public settings as evangelical Christians, in the name of Jesus, which is the only way evangelical Christians believe we can come before God the Father"); Nicola Menzie, *Evangelical Christianity, Catholicism Labeled "Extremist" in Army Presentation*, The Christian Post, April 6, 2013, available at http://www.christianpost.com/news/evangelical-christianity-catholicism-labeled-extremist-in-army-presentation-93353 (last visited July 31, 2013). This picking and choosing is impermissible.

The Second Circuit's reasoning substantially impairs a chaplain from praying according to his or her faith expression by eliminating a critical tenet of that faith expression. Moreover, this reasoning elevates a nonsectarian ideal that demobilizes the progression, expanse, and purity of First Amendment free exercise. *See Engel*, 370 U.S. at 429 (stating "the Government's placing its official stamp of approval upon one particular kind of prayer" is "one of the greatest dangers" prevented by the First Amendment).

B. The Second Circuit's observer-based effects test is a moving target that fosters greater state entanglement with religion.

The Second Circuit's observer-based effects test applied to legislative prayer demonstrates that the endorsement test, misapplied, may serve as a mechanism for religious exclusion. Here, for example, the Second Circuit advocates for the non-sectarian "reasonable observer," to the exclusion of a person who subscribes to Christianity. The Second Circuit's reasonable observer promotes neither civility nor neutrality. Instead, it requires greater State entanglement with religion and compels theological conformity, both of which are in stark contravention of the brilliant plurality of free exercise.[8]

Similar efforts directed against chaplains in the past have been deemed unconstitutional for permitting a religious viewpoint picked as acceptable while suppressing a religious view found unfavorable. *See, e.g., Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997) (holding unconstitutional President Clinton's attempt to censor chaplains' sermons mentioning pending legislation on partial-birth abortion and noting that a military policy allowing Catholics of one belief on abortion to share that view while ordering Catholics of a contrary belief to remain silent impermissibly "sanctioned one view of Catholicism . . . over another"). Similarly,

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[8] The district court noted that "as this case illustrates, the aspiration of many citizens is to eliminate legislative prayer entirely." *Galloway v. Town of Greece*, 732 F.Supp.2d 195, 237 (W.D.N.Y. 2010).

though the court in *Veitch v. England* did not make a constitutional determination on religious viewpoint suppression, the court stated: "Veitch's argument that a chaplain cannot be obliged to preach counter to his or her religious beliefs consistent with the First Amendment is hardly a frivolous claim. Fortunately for us—and unfortunately for Veitch—we need not decide this difficult question." 471 F.3d 124, 127 (D.C. Cir. 2006). The *Veitch* court prudently welcomed the opportunity *not* to serve as an "ecclesiastical arbiter" or adjudicate who is and or who is not, a reasonable observer.

Recognizing the existence of religious discrimination and the resulting inhibition of a chaplain's function, Congress has recently proposed an amendment that would allow chaplains to pray in the name of their specific faith deity. *See* Nat'l Defense Authorization Act Fiscal Year of 2014, HR 1960 PCS § 529(c). This section, which would apply to each branch of the military, provides that "[i]f called upon to lead a prayer outside of a religious service, a chaplain shall have the prerogative to close the prayer according to the traditions, expressions, and religious exercises of the endorsing faith group."[9]

In contrast to the failed experiment of the reasonable-observer effects test, the military chaplaincy provides a model of how legislative prayer can and should work. The military does not create, enforce, or require a generic, non-denominational religion. Rather, it essentially "outsources" the task of providing religious services to a wide array of

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[9] Presently, this amendment has passed in the House and has made it through two mark-ups in the Senate.

denominations who endorse ministers to be chaplains. The military does not pick and choose who may be a chaplain so long as a chaplain has the endorsement of his or her faith group.

This is essentially identical to the Town of Greece's prayer practice. The town welcomed anyone to offer a legislative prayer who respected and represented one segment of the community's beliefs. Neither the military nor a town should be enmeshed in determining who may pray and what they may say in their prayers. Rather, outsourcing this task fences State favoritism, both for the religious and non-religious.

This method modeled by the military chaplaincy and adopted by the Town of Greece is superior to the observer-based effects test for two reasons. First, it minimizes governmental involvement in making religious choices and determinations. Rather, the government simply functions as a gatekeeper, permitting anyone who is a minister endorsed by his faith group. Second, it allows for a much more vibrant religious exchange. Neither the military nor a legislative body should mandate bland, generic "nonsectarian" prayers. To do so would actually minimize the religious diversity and pluralism that the First Amendment seeks to protect. The military relies on 240 endorsers to ensure it encourages a multiplicity of faiths, provides for the needs of all service members, and allows for a free marketplace of religious ideas. This is the best course for First Amendment vitality.

CONCLUSION

For the reasons set forth above, the *amicus* respectfully requests this Court to conclude that the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

TOWN OF GREECE,

Petitioner.

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Second Circuit

BRIEF OF ERWIN CHEMERINSKY AND ALAN BROWNSTEIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Amici curiae respectfully submit this brief in support of Respondents pursuant to Supreme Court Rule 37.3.[1] *Amici* urge the Court to affirm the judgment of the United States Court of Appeals for the Second Circuit.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Erwin Chemerinsky is the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine School of Law, with a joint appointment in Political Science. He has authored a number of articles concerning the interpretation of the Establishment Clause. *See, e.g.*, Erwin Chemerinsky, *A Fixture on a Changing Court: Justice Stevens and the Establishment Clause*, 106 Nw. U. L. Rev. 587 (2012); Erwin Chemerinsky, *The Future of the Establishment Clause*, 28 Human Rights 16 (2001). He also has served as the Chair of the Elected Los Angeles Charter Reform Commission and was the Vice President for Education at Temple Emanuel in Beverly Hills, California.

Alan Brownstein is a Professor of Law, and Boochever and Bird Chair for the Study and Teaching of Freedom and Equality, at University of California Davis School of Law. He also has written

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amici curiae*, and their consent letters are on file with the Clerk's Office.

extensively on Establishment Clause issues. *See, e.g.*, Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger when Both Clauses Are Taken Seriously*, 32 Cardozo L. Rev. 1701 (2011); Alan Brownstein, *Continuing the Constitutional Dialogue: A Discussion of Justice Stevens' Establishment Clause and Free Exercise Jurisprudence*, 106 Nw. Univ. L. Rev. 605 (2012). He is a member of Congregation Bet Haverim in Davis, California, and has served on the Board, and as Vice-President and President, of the synagogue.

These scholars file this brief in support of respondents because they have a strong interest in the proper interpretation of the Establishment Clause, and they believe that Petitioner's arguments in this case – particularly their disregard for the *Lemon* and endorsement tests – would cause substantial problems with this Court's Establishment Clause jurisprudence. Moreover, as prominent members of their respective synagogues, they have an interest in ensuring that local governments treat their co-congregants as citizens of equal worth who deserve the same respect as other residents. In particular, Mr. Brownstein's synagogue is the only synagogue in Yolo County, but some members of his congregation live outside of Davis. If other towns in Yolo County followed the Town of Greece model, members of his congregation would be subject to discrimination with regard to invitations to offer prayers and subject to coercion if they appeared before a local city council to speak during public comment.

Amici support Respondents' argument that this Court's Establishment Clause cases, correctly understood, demonstrate that Petitioner's conduct here was unconstitutional.

SUMMARY OF THE ARGUMENT

This Court and lower courts have relied on the *Lemon* and endorsement tests for decades, and there is no basis for discarding them in this case. Petitioner advocates that this Court ignore the *Lemon* and endorsement tests, while various *amici* suggest that this Court overrule those tests entirely. However, this approach would be legally erroneous and practically disastrous.

First, the *Lemon* and endorsement tests have a strong foundation in precedent that cannot be so readily disregarded. To be sure, these tests are not applied in every Establishment Clause case, but they are applied in a wide variety of cases and they have withstood countless efforts to overrule them. Stare decisis is especially strong given the reaffirmation of these tests over such a long period. Moreover, the tests accurately reflect the Establishment Clause goals of religious liberty and government neutrality with respect to religion, while also proving flexible enough to deal with most factual situations.

Second, these tests play a crucial role in providing lower courts guidance in analyzing Establishment Clause issues. The enormous variety in the settings and government conduct at issue in Establishment Clause cases, and the numerous constitutional values implicated in church-state disputes, make it difficult for any single test to resolve all issues. Nonetheless, courts need, at a minimum, a workable framework for analyzing what

kinds of evidence are relevant and what kinds of considerations are important. Even if the *Lemon* and endorsement tests are imperfect, they at least provide a set of guidelines upon which lower courts can rely. Indeed, lower courts have been using these tests in hundreds of cases, and there is no crisis in Establishment Clause jurisprudence that would require a radical shift in how courts analyze these issues.

Third, there is no other test that can do this job. Petitioner and various *amici* suggest the coercion test, but this test has never been used as the sole basis for holding state action to be unconstitutional. And for good reason: Coercion is simply one type of injury that can arise from conduct that violates the Establishment Clause. However, it is not the only injury; the government cannot establish a state religion regardless of whether it coerces anyone into participating in that religion. As has been recognized in numerous cases adjudicating a wide range of church-state disputes, the Establishment Clause limits government conduct that favors certain faiths over others. A literal coercion test provides no basis for challenging the preferential promotion of favored faiths.

Finally, the conduct at issue here fails constitutional review under any test. As for *Lemon*, the Town's prayer had the effect of advancing one religion because the Town used a method for selecting the prayer-givers that inevitably excluded all non-Christian faiths. Because the prayer-givers were uniformly Christian, and the prayers they offered were distinctively Christian, the favoring of one religion was clear. Similarly, the Town's conduct

violated the endorsement test because an objective person, knowing how the prayer-givers were selected and hearing those prayers, would view it as a government endorsement of Christianity. As for coercion, given the participatory nature of the Town meetings – where residents seek to influence government decisions over matters directly affecting the individuals in attendance – audience members would unavoidably feel pressured to participate in Town-sponsored prayers before meetings.

ARGUMENT

I. THIS COURT SHOULD NOT DISCARD THE WELL-ESTABLISHED *LEMON* AND ENDORSEMENT TESTS FOR DETERMINING AN ESTABLISHMENT CLAUSE VIOLATION

A. The *Lemon* and endorsement tests have a strong basis in precedent.

Decades of precedent support the continued application of the *Lemon* test to adjudicate Establishment Clause disputes. Courts have relied on this test in deciding Establishment Clause cases for over forty years. Moreover, the *Lemon* test was not adopted in a vacuum. The test reflects the accumulated wisdom of the federal courts over years spent considering Establishment Clause issues. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). After considering its decisions in the "past score of years," the Court set forth in *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 222 (1963), what later became the purpose and primary effect factors of the *Lemon* test ("The test may be stated as follows: what are the purpose and the primary effect of the [statutory] enactment?"). These "purpose and primary effect factors" formalized

the Court's analysis of prior Establishment Clause cases. *See Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 241-43 (1968) (noting that *Schempp* based its test on earlier cases). Several years later, the Court propounded an additional factor for courts to use when analyzing Establishment Clause issues. Recognizing there could be "[n]o perfect or absolute separation" between church and state, courts would also be encouraged to "mark boundaries to avoid excessive entanglement" between church and state. *Walz v. Tax Comm'r of City of New York*, 397 U.S. 664, 670 (1970).

Shortly thereafter, the Court combined the factors in *Schempp* and *Walz* to create the three-factor *Lemon* test: (1) "the statute must have a secular legislative purpose"; (2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and (3) "the statute must not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13 (citations and quotations omitted). The Court has repeatedly embraced the origins of the *Lemon* test in applying its three factors. *See, e.g., Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 -73 (1973) ("[T]he now well-defined three-part test that has emerged from our decisions is a product of considerations derived from the full sweep of the Establishment Clause cases."); *Roemer v. Bd. of Pub. Works of Maryland*, 426 U.S. 736, 748 (1976) (plurality opinion) ("the Court distilled these concerns into a three-prong test, resting in part on prior case law"); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 653 (1980) (*Lemon* test factors derived from "the precedents of this Court"); *Wallace v. Jaffree*, 472 U.S. 38, 55 (1985) (in

considering Establishment Clause cases, the Court "has examined the criteria developed over a period of many years").

The three factors of the *Lemon* test reflect the goals of the Establishment Clause: protection of religious liberty and government neutrality with respect to religion. With an eye toward these goals, *Lemon* established that courts should "careful[ly] evaluat[e]" the particular facts of each case due to the fact-intensive nature of religion issues. *Wheeler v. Barrera*, 417 U.S. 402, 426 (1974). Indeed, *Lemon*'s fact-specific inquiry was immediately manifest, in that a companion case to *Lemon* reached an opposite result on the question of excessive entanglement with religion.[2]

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[2] In *Lemon*, the Court considered two statutes that provided state aid for secular subjects in Catholic schools but simultaneously prohibited state aid for religious subjects. 403 U.S. at 606-07. After identifying the three-factor test, the Court held that, pursuant to the third prong, the statutes "foster[ed] an impermissible degree of entanglement" and were unconstitutional. *Id.* at 615.

In contrast, the Court considered in the companion case of *Tilton v. Richardson*, 403 U.S. 672 (1971), whether federal grants for the construction of academic facilities at private colleges, including religious-affiliated colleges, could be restricted to non-sectarian uses only. The Court found no constitutional violation after it carefully examined the record and determined that there were facts which would "substantially diminish the extent and

The crucial malleability of *Lemon* has allowed the Court to refine it to accommodate different fact scenarios while still preserving its essential framework. In particular, the Court has advanced a *Lemon*-endorsement hybrid test, which has two prongs: (1) under the purpose prong, courts should allow some deference to the government when examining its intent; and (2) under the effects prong, a given governmental act unconstitutionally advances religion if it endorses religion from the viewpoint of an "objective observer, acquainted with the test, legislative history, and implementation of the statute . . . ." *Wallace*, 472 U.S. at 68-76 (O'Connor, J., concurring in the judgment); *see also McCreary v. Am. Civ. Liberties Union of Kentucky*, 545 U.S. 844, 862, 866 (2005) (applying *Lemon*-endorsement test). This hybrid analysis renders *Lemon* more versatile by creating an analytical framework whereby courts are encouraged to review historical facts and context. *Wallace*, 472 U.S. at 69-70, 74-76 (O'Connor, J., concurring in the judgment) ("Under this view, *Lemon*'s inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement.").

For another example of the flexibility of the *Lemon* test, the Court collapsed the excessive entanglement prong into the primary effect prong in *Agostini v. Felton*, 521 U.S. 203, 218, 232-33 (1997).

(continued...)

the potential danger of the entanglement." *Id.* at 684-89 (plurality opinion).

It found that, "in *Lemon* itself, the entanglement that the Court found 'independently' to necessitate the program's invalidation also was found to have the effect of inhibiting religion." *Id.* at 233 (quoting *Lemon*, 403 U.S. at 620). "Thus, it is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect." *Id.* *Agostini* further refined *Lemon* by clarifying the criteria for whether government assistance to schools has the effect of advancing religion: the aid "does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.* at 234. But these clarifications did not change the underlying goals, substance, and character of *Lemon*; rather, the Court deftly "recast" *Lemon* to better fit the challenges confronted in addressing public assistance to religious schools. *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (plurality opinion).

Accordingly, the *Lemon* test – along with the endorsement hybrid of that test – has proven to be a flexible and resilient method of analyzing Establishment Clause cases. Indeed, *Lemon* has been used to analyze a wide variety of religious issues, such as the constitutionality of providing state financial assistance to parochial primary and secondary schools, *Nyquist*, 413 U.S. at 761-62; state financial aid to church-affiliated colleges and universities, *Roemer*, 426 U.S. at 748-54; *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 485-86 (1986); school prayer, *Sante Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000); and the display of religious icons on government property, *McCreary*, 545 U.S. at 859-65; *Salazar v. Buono*, 559 U.S. 700, 707-08 (2010).

Stare decisis is particularly strong in this context because the *Lemon* test has evolved out of so many cases over such a long time period. "Stare decisis . . . is of fundamental importance to the rule of law. Even in constitutional cases, in which stare decisis concerns are less pronounced, we will not overrule a precedent absent a special justification." *Harris v. United States*, 536 U.S. 545, 556-57 (2002) (plurality opinion) (internal quotation marks and citations omitted). "This is especially true where, as here, the principle has become settled through iteration and reiteration over a long period of time." *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality opinion); *see also, e.g., Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now.").

To be sure, the Court has not applied *Lemon* or the endorsement test in every Establishment Clause case. Rather, the Court has recognized that certain religion clause issues require application of different tests. For example, the Court found that *Lemon* was inapplicable in dealing with the erection of a passive monument, depicting the Ten Commandments, on the grounds of the Texas State Capitol. *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion) (analysis "driven both by the nature of the monument and by our Nation's history"). The Court likewise did not invoke the *Lemon* or endorsement test when faced with a prayer at a middle school graduation ceremony. *See Lee v. Weisman*, 505 U.S. 577 (1992).

Nonetheless, even in those decisions that do not apply a *Lemon* or endorsement analysis, the Court has repeatedly rejected the idea of repudiating the tests entirely. As recently as 2005, the Court upheld the *Lemon* test despite a request to "abandon" it. *McCreary*, 545 U.S. at 861-65. In addition, the Court has disregarded a series of strongly-worded dissents calling for the repudiation of the *Lemon* test. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (including an entreaty to "drive[] pencils through the creature's heart"); *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 750-51 (1994) (Scalia, J., dissenting); *Lee*, 505 U.S. at 644 (Scalia, J., dissenting); *Wallace*, 472 U.S. at 108-12 (Rehnquist, J., dissenting); *id.* at 90-91 (White, J., dissenting).

In addition, for nearly forty years, the Court has noted that it has not created nor would it find a single test for religion cases that could serve as a viable alternative to *Lemon*. *See Mitchell*, 530 U.S. at 869 (Souter, J., dissenting) ("In all the years of its effort, the Court has isolated no single test of constitutional sufficiency . . . . Particular factual circumstances control, and the answer is a matter of judgment."); *Grumet*, 512 U.S. at 720 (O'Connor, J., concurring in part and concurring in the judgment) ("Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test."); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) ("But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."). In fact, *Lemon* remains "the only coherent test a majority of the Court has ever adopted," *Wallace*, 472 U.S. at 63

(Powell, J., concurring), and it should not be overturned with no other suitable test to replace it. As Justice Kennedy explained in *Salazar*, "this Court's jurisprudence in this area has refrained from making sweeping pronouncements, and this case is ill suited for announcing categorical rules." 559 U.S. at 722 (plurality opinion).

B. Lower courts rely heavily on the *Lemon* and endorsement tests for guidance.

The guidelines of the *Lemon* and endorsement tests have been invaluable for lower courts when interpreting the Establishment Clause. It is generally acknowledged that "[t]he Establishment Clause of the First Amendment has consistently presented this Court with difficult questions of interpretation and application," and lower courts need clear guidance on how to analyze these difficult issues. *Witters*, 474 U.S. at 485. And *Lemon*'s guidelines also are flexible enough to allow lower courts some discretion in considering a wide assortment of factual issues.

For example, in the past five years alone, more than one hundred district courts have used or cited the *Lemon* test in their analysis of Establishment Clause issues. The diversity of religious issues and factual scenarios lower courts face is staggering. *See, e.g., Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J.*, No. 11 Civ. 6026, 2013 WL 1285321, at *10 (S.D.N.Y. Mar. 28, 2013) (holding constitutional the decision to place a steel cross from the World Trade Center site wreckage in the National September 11 Memorial and Museum Foundation); *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 800 F. Supp. 2d 405, 414-15 (E.D.N.Y. 2011) (statute regulating labeling

and marketing of food labeled as kosher held constitutional); *C.F. v. Capistrano Unified Sch. Dist.*, 647 F. Supp. 2d 1187, 1193 (C.D. Cal. 2009) (holding overbroad proposed injunction ordering teacher to "refrain from expressing any disapproval of religion while acting in his official capacity as a public school employee"); *Stratechuk v. Bd. of Educ., S. Orange-Maplewood Sch. Dist.*, 577 F. Supp. 2d 731, 751-52 (D.N.J. 2008) (holding policy banning holiday music constitutional as it "prevent[s] an overt endorsement of religion or an improper focus on religious holidays"); *Weinbaum v. Las Cruces Pub. Schs.*, 465 F. Supp. 2d 1182, 1194 (D.N.M. 2006) (emblem with three crosses on it "affixed to . . . maintenance vehicles" constitutional as it "symbolically represent[s] Las Cruces–a uniquely named geopolitical subdivision–rather than an endorsement of Christianity"); *Americans United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 934 (S.D. Iowa 2006), *aff'd in part, reversed in part*, 509 F.3d 406 (8th Cir. 2007) (holding unconstitutional organization providing pre-release rehabilitation services to inmates through program based on Evangelical Christianity); *Hansen v. Ann Arbor Pub. Schs.*, 293 F. Supp. 2d 780, 803-06 (E.D. Mich. 2003) (improper for school to invite six clergy panelists, during diversity awareness week, expressing view that homosexuality is consistent with religion); *Boone v. Boozman*, 217 F. Supp. 2d 938, 945-50 (E.D. Ark. 2002) (holding unconstitutional Arkansas student immunization statute recognizing objections only based on tenets or practices of "recognized church or religious denomination"); *Jabr v. Rapides Parish Sch. Bd. ex rel. Metoyer*, 171 F. Supp. 2d 653, 659-61 (W.D. La.

2001) (public school board's manner of distributing Bibles to elementary school students held unconstitutional); *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897, 912-14 (W.D. Mich. 2000) (school's "Moral Focus Curriculum" that "coincide[s] or harmonize[s] with the tenets of some or all religions, does not necessarily betoken endorsement"); *Forte v. Coler*, 725 F. Supp. 488, 490-91 (M.D. Fla. 1989) (holding constitutional statute exempting religious child care facilities from certain licensing requirements); *Spacco v. Bridgewater Sch. Dep't*, 722 F. Supp. 834 (D. Mass. 1989) (granting preliminary injunction requiring elementary students be reassigned from public school facility leased from Roman Catholic Church); *Am. Civ. Liberties Union of Kentucky v. Wilkinson*, 701 F. Supp. 1296, 1313-14 (E.D. Ky. 1988) (holding constitutional nativity display, consisting of a "rustic stable," on State Capitol grounds, while also holding unconstitutional state's limitation of use of display to nativity pageants); *Cammack v. Waihee*, 673 F. Supp. 1524, 1538 (D. Haw. 1987) (holding constitutional Hawaii statute declaring Good Friday a legal holiday); *Stark v. St. Cloud State Univ.*, 604 F. Supp. 1555, 1563-64 (D. Minn. 1985) (state university's policy permitting students to satisfy teaching requirements at parochial schools unconstitutional). Also, many of those cases apply the endorsement test in conjunction with the *Lemon* test. *See, e.g.*, *Weinbaum*, 465 F. Supp. 2d at 1191-92; *Jabr*, 171 F. Supp. 2d at 663; *Am. Civ. Liberties Union of Kentucky*, 701 F. Supp. at 1309-10.

The *Lemon* and endorsement tests thus provide a workable set of guidelines for lower courts to use in a wide array of religious issues. To discard these tests

would unmoor Establishment Clause jurisprudence from any foundation. As it stands, lower courts use *Lemon* to set the parameters for what facts matter (*i.e.*, those concerning purpose, effect, and entanglement), and therefore what testimony and documentary evidence is relevant. Without *Lemon* or the endorsement test, there is no way for lower courts to organize the compilation of a record, let alone analyze the evidence within it.

II. THE COERCION TEST IS INSUFFICIENT TO BECOME THE SOLE TEST OF ESTABLISHMENT CLAUSE VIOLATIONS

While coercion is a factor to consider, this Court repeatedly has rejected coercion as the sole test for determining compliance with the Establishment Clause. To begin with, most cases have not considered coercion at all, rather (as discussed above) applying some combination of the *Lemon* and endorsement tests. These cases reflect the reality that looking at whether a person was coerced does not always illuminate the ultimate issue of whether the government has taken impermissible steps toward establishing a state religion.

Critically, the narrow coercion test, standing alone, provides no basis for challenging government actions that favor certain religions over others. Yet this Court has recognized repeatedly both in earlier cases and more recent decisions that the prohibition against religious preferentialism is one of the core principles on which the Establishment Clause is grounded. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over

another."). While the language used by different Justices may vary among a wide range of church-state disputes, the commitment to denominational neutrality has remained a bedrock foundation of Establishment Clause jurisprudence.

This concern for religious neutrality, which would be all but entirely ignored by a literal coercion test, has been emphasized in cases evaluating religious accommodations. *See, e.g., id.* at 245 (provision exempting certain faiths but not others from charitable organization registration and reporting requirements unconstitutionally grants "denominational preference"); *Grumet*, 512 U.S. at 722 (Kennedy, J., concurring) ("a religious accommodation demands careful scrutiny to ensure that it does not so burden non-adherents or discriminate against other religions as to become an establishment"); *Estate of Thornton v. Caldor*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) (law singling out Sabbath observers for special protection without according protection to the beliefs and practices of other faiths unconstitutionally endorses particular religious beliefs); *Cutter v. Wilkinson*, 544 U.S. 709, 720, 724 (2005) (Religious Land Use and Institutionalized Persons Act does not violate Establishment Clause on its face because it "confers no privileged status on any particular religious sect," but to avoid as applied challenges, it must "be administered neutrally among different faiths"). Neutrality is also a central requirement in decisions reviewing government funding programs. *See, e.g., Mitchell*, 530 U.S. at 829 (plurality opinion) (requiring government aid programs to private schools to award subsidies based on neutral, secular, nondiscriminatory criteria in order to withstand

Establishment Clause review); *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002) (upholding school voucher program against Establishment Clause challenge because it "is neutral in all respects toward religion").

Neutrality also plays an important role in cases, such as this one, involving government-sponsored prayers and religious displays. *See, e.g.*, *Wallace*, 472 U.S. at 113 (Rehnquist, J. dissenting) (arguing that the Framers designed the Establishment Clause to prevent government "from asserting a preference for one religious denomination or sect over others" or "discriminating between sects"); *Schempp*, 374 U.S. at 216 (accepting that, at a minimum, "the Establishment Clause forbids . . . government preference of one religion over another" while insisting that it has a broader scope); *McCreary*, 545 U.S. at 875-76 (explaining that the Establishment Clause mandates that "the government may not favor one religion over another" in order "to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate").

Furthermore, even in the cases that have looked to coercion, it has been only part of the analysis; those cases have not purported to use coercion as the sole test, to the exclusion of all other factors. As *Lee* stated, ""the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, *or otherwise act in a way which 'establishes a state religion or religious faith, or tends to do so.'*" 505 U.S. at 587 (emphasis added; quoting *Lynch*, 465 U.S. at 678). Moreover, this Court analyzed a prayer before high

school football games under the *Lemon*, endorsement, and coercion tests. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 310-16. Similarly, Justice Kennedy's opinion in *Allegheny* analyzes coercion within the *Lemon* framework, demonstrating that the tests are not mutually exclusive. *See County of Allegheny v. Am. Civ. Liberties Union*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment in part, dissenting in part) ("I am content for present purposes to remain within the *Lemon* framework . . . ."). In particular, Justice Kennedy analyzed coercion in deciding "whether the 'principal or primary effect' of the challenged government practice is 'one that neither advances nor inhibits religion.'" *Id.* at 656 (quoting *Lemon*, 403 U.S. at 612).

More generally, this Court's Establishment Clause jurisprudence has made clear that context matters in determining how to analyze the government's conduct. *See, e.g., Lee*, 505 U.S. at 597 ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one."). For instance, *Lee* relies on coercion in the context of school prayer at a graduation ceremony because coercion is a concern for school children who are under intense social pressure to conform. *See id.* at 592. On the other hand, *Van Orden* focuses on "the nature of the monument and . . . our Nation's history" because the *Lemon* test (and presumably the coercion test, as well, which goes unmentioned in the opinion) are "not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds." 545 U.S. at 686 (plurality opinion); *cf. id.* at 693-94 (Thomas, J., concurring) (applying the coercion test). And in a case involving the creation of a school district to encompass a religious group, the Court

relied on "[t]he general principle that civil power must be exercised in a manner neutral to religion." *Grumet*, 512 U.S. at 704; *see also id.* at 728 (Kennedy, J., concurring in the judgment) ("[O]ne such fundamental limitation is that government may not use religion as a criterion to draw political or electoral lines.").

It would be an enormous (and erroneous) departure to suggest that one idea like coercion can decide every case. As Justice O'Connor has explained: "It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause. . . . But the same constitutional principle may operate very differently in different contexts." *Id.* at 718 (O'Connor, J., concurring in part and concurring in the judgment). Indeed, there is no one test for the Free Speech Clause or the Fourth Amendment, but rather a number of tests that apply in different contexts. While *Lemon*, at least, is broad enough to cover the Establishment Clause concerns at stake in most cases, coercion fails to do so.

Furthermore, coercion cannot be the sole test because it would leave no separate meaning to the Establishment Cause beyond the protections already mandated by the Free Exercise Clause. As this Court has recognized, "[t]he distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." *Schempp*, 374 U.S. at 223. And this Court has continued to hold that the government violates the Free Exercise Clause if it coerces persons to be a part of religious observances. *See*

Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 877 (1990) (under Free Exercise Clause, "government may not compel affirmation of religious belief"); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) ("[T]his Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny . . . ."). Accordingly, "a literal application of the coercion test would render the Establishment Clause a virtual nullity." *Lee*, 505 U.S. at 621-22 (Souter, J., concurring).

III. THE ACTIVITY AT ISSUE HERE IS UNCONSTITUTIONAL UNDER ANY TEST

A. The Board meeting prayer is unconstitutional under the *Lemon* and endorsement tests.

Applying the *Lemon* and endorsement tests, the Town of Greece's prayer at Board meetings runs afoul of the Establishment Clause. While Respondents have abandoned an argument regarding intentional discrimination, *see Galloway v. Town of Greece*, 681 F.3d 20, 26 (2d Cir. 2012), the effects prong of *Lemon* demonstrates the problem with the Town's actions here.

The effect was to advance the Christian religion because of the method the Town chose for selecting people to offer the prayer. In particular, the Town chose clergy from the religious organizations listed in the Town's Community Guide. *Id.* at 23. The result was that, until 2008, only Christian clergy were invited to give the prayer at the meetings. Indeed, the Town's practice of relying on the Community Guide not only favors Christians over non-Christians,

it also necessarily discriminates between large faiths (*i.e.*, those popular enough to have a congregation and house of worship) and smaller, newcomer faiths with insufficient members to have a local congregation. In addition, the policy discriminates between traditional, organized religions and people who are spiritual, but do not affiliate with any organized faith.

Indeed, if every town used only a directory of congregations located within that town as the source of clergy to be invited to lead prayers, many religions would be left out. There are many towns with minority religious populations that do not have a critical mass large enough to form a congregation within its borders, but attend a house of worship in neighboring communities. Here, for instance, there were two Jewish synagogues just outside the Town, both apparently unlisted in the Community Guide. *See id.* at 24. However, the fact that the Jewish people in the Town of Greece pray in a synagogue outside of the town limits does not allow the Town to pretend that they do not exist.

This discriminatory effect is the inevitable result of the Town's policy, which only recognized the existence of religious individuals affiliated with congregations listed in the Community Guide. And it certainly would not have been difficult to include others, simply by asking for volunteers. In fact, the Town did so after respondents complained – although the Town appears to have stopped inviting non-Christian prayer-givers by the time the record closed in this case. *See id.* at 23.

This Court has recognized that such discrimination between "well established churches"

and "churches which are new and lacking in a constituency" violates the Establishment Clause. *Larson*, 456 U.S. at 246 n.23. Indeed, it directly conflicts with the fundamental principle that government "must be neutral in matters of religious theory, doctrine, and practice" and "may not aid, foster, or promote one religion or religious theory against another." *Epperson v. Arkansas*, 393 U. S. 97, 103-04 (1968); *see also, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) ("[W]e have held that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion." (internal quotation marks omitted)). To be sure, neutrality – when taken to its "logical extreme" – could go too far in requiring a "relentless extirpation of all contact between government and religion." *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part). However, at a minimum, neutrality requires that the government not involve itself with religion through a process whereby it repeatedly (and inevitably) chooses one particular religion over all others.

For similar reasons, the Town's actions fail when viewed through the lens of the endorsement test. The choice of only Christian clergy to give the prayer at Board meetings, who were selected pursuant to a policy that inevitably produces that result, is an endorsement of Christianity. The nature of the prayers confirms this endorsement, as approximately two-thirds had references particular to Christianity. *Galloway*, 681 F.3d at 24.

Moreover, most of the prayer-givers purported to speak on behalf of the Town and all of the residents, rather than just for the speaker himself or herself. *Id.* at 32. If, for instance, the Board members themselves gave the prayers, and did so only with Christian language virtually every week, then the violation would be clear.[3] The fact that the Board delegated its authority to religious leaders to deliver the uniformly Christian prayers does not change the message delivered to a reasonable observer, which is simply that the Board considers the Town of Greece to be a Christian community in which non-Christians are outsiders whose religious beliefs can be ignored. In this sense, the Town's policy is essentially the same as the government using a loudspeaker from City Hall to offer Christian prayers every Sunday, which plainly would represent an impermissible establishment of religion. In short, an objective observer would view the repeated giving of Christian prayers before official government meetings – by state-selected prayer-givers who act as though they are representing the views of the Town – as an endorsement of Christianity.

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[3] Indeed, this would be more constitutionally problematic than a Latin cross on City Hall, which is widely recognized as a violation. *See, e.g.*, *Salazar v. Buono*, 559 U.S. at 715 (plurality opinion); *id.* at 747 n.6 (Stevens, J., dissenting); *County of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part). The Latin Cross is a passive display from which a person can look away, but the prayer is active conduct designed to influence and invite a response (such as standing or bowing one's head) from a captive audience.

B. The Board meeting prayer is unconstitutional under the coercion test.

Applying a full understanding of the coercion test, the Town's actions here are still unconstitutional. To begin with, coercion is not solely, as Petitioner contends, "when an individual is *required* to participate in religious activities." Pet'r Br. at 39. Petitioner's extraordinarily narrow conception of coercion would not cover many clear violations, including a Latin cross on top of City Hall, which obviously does not require anything of the people who see it. In particular, Petitioner's test of coercion suggests that anything goes in a legislative prayer because "the listener may do as he likes." *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting). Pet'r Br. at 48. But this is not the law, even assuming *Marsh* were applicable here. *See Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983) (accepting a legislative prayer only where it does not "advance any one . . . faith or belief").

More generally, the Constitution forbids the government from taking impermissible steps toward establishing a state religion, regardless of whether it affirmatively requires a person to participate in that religion. For that reason, Justice Kennedy has explained that coercion does not mean "direct coercion" and "need not be a direct tax in aid of religion or a test oath." *County of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part). Rather, the question is whether there is "some measure of more or less subtle coercion, be it in the form of . . . direct compulsion to observance, or governmental

exhortation to religiosity that amounts in fact to proselytizing." *Id.* at 659-60 (Kennedy, J., concurring in the judgment in part and dissenting in part). As far back as *Engel v. Vitale*, the first school prayer case, this Court recognized that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the officially approved religion is plain." 370 U.S. 421, 431 (1962). Thus, coercion is the inevitable consequence of illegitimate government support for religion.

A person need not actually show that the government coerced him to change his religious beliefs or practices in order to establish a constitutional violation. The problem with religious coercion is not merely that it may succeed, but that when religious individuals defy the state's coercive efforts, they risk burdens and penalties for doing so. That is why a passive accommodation of religion is unlikely to coerce, *see County of Allegheny*, 492 U.S. at 662-63 (Kennedy, J., concurring in the judgment in part and dissenting in part), but affirmative conduct can more readily do so, *see Lee*, 505 U.S. at 596-99.

Even under a more stringent conception of a coercion test, the Town's prayer policy violates the Establishment Clause. Here, the coercive force of the government's conduct is far greater than it was in *Lee*. In *Lee*, the students had little reason to worry that their refusal to participate in the prayer (or not to attend the graduation ceremony at all) would result in unfavorable treatment from school personnel. Here, town residents attend Board meetings to address government decision makers on

matters that may significantly impact their lives and property and as to which the Board has considerable discretionary authority. Thus, citizens would have legitimate concerns that their refusal to join in prayers would risk alienating the very political decision makers they were trying to influence during public comment.

This is the key distinction between this case and *Marsh*.[1] A state legislature enacts general legislation that impacts a large number of people. A town board, in contrast, addresses individual disputes and concerns involving land use and local spending priorities – the kind of decisions which require the exercise of substantial discretion in weighing the competing concerns of relatively small constituencies. Moreover, the members of the audience at a board meeting, unlike a state legislative session, are not only the identifiable subject of the government's decision, they are there to speak to the board on their own behalf. In short, the audience at a town Board meeting is often participating in, not just observing, its government at work. And the cost of political participation cannot be the pressure to participate in a Christian prayer spoken by a person chosen in a manner that excluded other religions. In a setting

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[1] In any event, *Marsh* did not apply the coercion test, but rested on an historical analysis of the use of a legislative prayer by the U.S. Congress. *See McCreary*, 545 U.S. at 859 n.10 (noting that *Marsh* represented a "special instance[]"). However, for the same reasons that the Board meeting is unlike a state legislative session, it also is unlike a session of the U.S. Congress.

designed to allow and encourage citizens to petition their government, the state is prohibited from asking citizens to participate in religious ceremonies. Petitioning decision makers at public meetings cannot be preconditioned on citizens bowing their heads, standing, or reciting a prayer – or on citizens identifying themselves as unwilling to do so.

Another important distinction between this case and *Marsh* is the repeated exclusion of non-Christian religions and the explicitly Christian nature of the prayers. To be sure, the state legislature in *Marsh* chose a clergyman of one denomination. *See* 463 U.S. at 793. However, there is a significant difference between appointing one person (who necessarily will come from one religious faith), and choosing many different prayer-givers while time and again excluding non-Christian religions. Simply put, there is nothing intrinsically problematic about being asked to listen to prayers of someone else's faith, but it becomes problematic when the message communicated is that the Town supports Christianity and other religions are not welcome – and even more problematic when citizens face pressure to join in the prayers. That is the same reason why a Latin cross atop City Hall is impermissible (while the Ten Commandments as part of a display of many monuments is acceptable, *see Van Orden, supra*): "an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *County of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in judgment in part and dissenting in part). If anything, displaying a Latin cross to the audience before every Town Board meeting, unconstitutional as it would be, is less problematic

and implicitly more coercive than beginning every Board meeting with Christian prayers offered by clergy selected through discriminatory invitation procedures.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

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TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court of Appeals erred in holding that a legislative-prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 85 Members of Congress in the United States House of Representatives, and are individually named in the Appendix to this brief. This group is bipartisan and multi-faith.

These elected Representatives regard legislative prayer as important for policymaking bodies, both to solemnize official occasions and to seek God's blessing and guidance in making consequential decisions. Each Member also represents municipalities—not unlike Petitioner Town of Greece—and part of a sovereign State, each of which is governed by a body that practices legislative prayer at the outset of its meetings and sessions.

Moreover, *amici* are concerned over the growing exclusion of longstanding and historically-accepted acknowledgments of the Divine and expressions of religious faith in this Nation—whether religious speech or passive displays. Congress now regularly sees its actions set at naught by an erroneous view of the Establishment Clause. This case is merely the latest example proving that the Establishment Clause framework often employed in recent years by this Court is fundamentally flawed, and should be replaced by an objective standard that comports with the

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[1] No counsel for any party authored this brief in whole or part, and no one apart from *amici curiae* or their counsel made a monetary contribution to its preparation or submission. All parties consented to the filing of this brief, and were timely notified.

original meaning, longstanding application, and historical understanding of the First Amendment.

SUMMARY OF ARGUMENT

This case offers the Court the opportunity to restore a workable and principled test for the Establishment Clause. Although this should have been an easy case under *Marsh v. Chambers*, 463 U.S. 783 (1983), it instead became one of several circuit splits over the appropriate test for government actions intersecting religion. These circuit splits have arisen because of irremediable flaws in the endorsement test that this Court narrowly adopted in *County of Allegheny v. ACLU, Greater Pittsburgh Ch.*, 492 U.S. 573 (1989), which was a revision prompted by the unworkability of the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *Lemon*/endorsement test should be replaced with the coercion test advocated by four dissenting Justices in *Allegheny*.

The endorsement test has completely subsumed the three-pronged *Lemon* test, and has proved as unworkable in practice as it is unsound in principle. This Court has issued a series of narrowly-divided and splintered decisions that have confused the lower courts, baffled the public, and incentivized government officials to suppress legitimate religious expression in order to avoid the costs and hazards of litigation. Although this Court declined to apply *Lemon* to legislative prayer in *Marsh*, the court below invalidated Petitioner's legislative-prayer practice as a religious endorsement, confirming that the endorsement test will bedevil the First Amendment until it is replaced with a workable, principled, and objective test.

Scholarly commentators are as divided as the Court about the proper interpretation of the Establishment Clause, but widely agree about one thing: The endorsement test does not represent either a correct interpretation of the Constitution or a workable basis for a coherent jurisprudence. There is no hope that anyone will figure out how to clarify the endorsement test so as to avoid the serious problems that it has manifestly generated during its short and troubled life.

Stare decisis does not require continued adherence to the endorsement test. The Court should therefore abandon the *Lemon*/endorsement test in favor of the Establishment Clause's traditional understanding, which was grounded in the Constitution's text, history, and earlier precedent.

Such a test simply requires government to refrain from coercing participation in any religion or religious exercise, or from effectively creating a state religion. This coercion test was implicitly utilized by the Court in *Marsh*, and should be expressly adopted as the test for the Establishment Clause.

ARGUMENT

Legislative prayer jurisprudence has gone seriously awry. Rather than doing so of its own accord, the disarray in the lower courts is the direct and predictable result of the endorsement test, with its insurmountable subjectivity and latent hostility toward even benign and historically-accepted acknowledgments of faith.

The endorsement test narrowly adopted in *County of Allegheny v. ACLU, Greater Pittsburgh Ch.*, 492 U.S. 573 (1989), has created enormous confusion and uncertainty, which has been aggravated by the splintered decision in *Van Orden v. Perry*, 545 U.S. 677 (2005). The endorsement test is encompassed in the question presented in this case, as it was applied by the court below to invalidate Petitioner's practice. *See* Pet. i.

The Court should resolve the various circuit splits over the appropriate test for evaluating whether any governmental action intersecting religion violates the Establishment Clause, including legislative prayers. Specifically, the Court should set aside the "endorsement test"—as five Justices have urged in recent years—and instead adopt the "coercion test." Under the coercion test, "government may not coerce anyone to support or participate in any religion" or otherwise directly benefit religion to such a degree as to effectively establish a national religion. *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part). Petitioner convincingly explains why the endorsement test is fundamentally flawed, Pet. Br. 40–50, and why the coercion test is correct, *id.* at 35–40.

The lower courts have been unable to apply the endorsement test consistently in this case and countless others, and scholarly literature strongly suggests they will never be able to do so. This Court itself implicitly suggested as much through its unwillingness or inability to apply the test in *Van Orden*. *See* 545 U.S. at 681 (plurality opinion); *id.* at 700 (Breyer, J., concurring in the judgment). The four

Justices who dissented from adopting the endorsement test in 1989 were correct, and the time has come for the Court to recognize they were right.

I. CONGRESS HAS AN INTEREST IN A SINGLE COHERENT ESTABLISHMENT CLAUSE RULE THAT PROTECTS LONGSTANDING AND TRADITIONAL PUBLIC ACKNOWLEDGMENTS OF FAITH.

A. Congress opens its daily sessions with legislative prayer, a practice that is fully consistent with the Establishment Clause. *Marsh v. Chambers*, 463 U.S. 783, 792–95 (1983). When the House Chaplain or a guest offers prayer in the House, he stands on the Speaker's Rostrum and faces both the Members and the citizen audience, making no distinction and apparently involving everyone.[2] As *amici* asserted when supporting Town of Greece's petition for certiorari, Chaplains say "we" and/or "Let us pray" 97% of the time, implicitly including everyone. [Cert-Stage] Brief of Members of Congress 22. Even in today's religiously-diverse culture, a majority of prayers include Christian references. *Id.* at 20. And 97% of modern prayer-givers are Christian. *Id.* at 9. When a guest offers prayer, the Chaplain gives no instruction to avoid faith-specific language.

Congress' longstanding prayer practice would fail under the tests promulgated by the Second Circuit in this case and the Fourth Circuit in previous cases. *Id.* at 7–23, 25–26. In these cases, the Court of Appeals

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[2] *See, e.g.*, House Prayer, http://www.c-spanvideo.org/program/HouseSession5423 (July 11, 2013).

invalidated prayer practices as endorsements of Christianity. Pet. App. 16–17a, 20–23a; *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 355 (4th Cir. 2011). At minimum, it is imperative this Court reverse the Second Circuit, and in so doing correct the Fourth Circuit as well.

B. But there are many other areas where Congress has acted on matters intersecting religion, which are also imperiled by the judiciary's recent jurisprudence. A Federal war memorial in the Mojave Desert was held unconstitutional as an endorsement of Christianity, and saved only by transferring the plot of land where the memorial sat to a private veterans' organization. *Salazar v. Buono*, 130 S. Ct. 1803, 1813–14, 1819, 1821 (2010) (plurality opinion). After 24 years of litigation, another congressionally-sanctioned memorial—the Mt. Soledad Veterans Memorial—has been invalidated as an endorsement of Christianity in its current form, and is now undergoing modifications in an attempt to save it. *See Trunk v. San Diego*, 629 F.3d 1099, 1103, 1124–25 (9th Cir. 2011).

Other matters pertaining to faith codified in Federal law by Congress have likewise been challenged over the past decade as endorsements of religion. These include the National Motto, 36 U.S.C. § 302, the National Day of Prayer, 36 U.S.C. § 119, and the Pledge of Allegiance, 4 U.S.C. § 4. Even the Chief Justice of this Court has been sued because of traditional language said when administering the President's Oath of Office at Inaugurations. *See Newdow v. Roberts*, 603 F.3d 1002, 1006 (D.C. Cir. 2010).

Amici do not regard disposing of these cases on threshold issues or divestiture of ownership as a viable defensive strategy. At some point plaintiffs with justiciable cases may emerge and receive final judgment on the merits, imperiling these longstanding creations of Congress.

C. The Capitol itself has many features expressing religious messages that could likewise be jeopardized by this national trend. The words of the National Motto—"In God We Trust"—are emblazoned in bronze above the Speaker's Rostrum in the House.[3]

Such religious messages are also found in Congress' artwork. In the Capitol Rotunda, Congress showcases Pocahontas converting from her native faith to Christianity with a large painting commemorating her baptism.[4] Another painting of the Pilgrims sailing to America emphasizes an open Bible and prayer, with "God with us" inscribed in the picture.[5] And Congress appropriated funds to construct and decorate myriad

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[3] U.S. House of Reps., History, Art & Archives, What's in the House Chamber?, The Rostrum & U.S. Flag, http://history.house.gov/Exhibitions-and-Publications/House-Chamber/Rostrum-Flag/.

[4] "The Baptism of Pocahontas," *in* Architect of the Capitol, Explore Capitol Hill, http://www.aoc.gov/capitol-hill/historic-rotunda-paintings/baptism-pocahontas.

[5] "Embarkation of the Pilgrims," *in id.*, http://www.aoc.gov/capitol-hill/historic-rotunda-paintings/embarkation-pilgrims.

such religious displays throughout Washington, D.C., including paintings of Jesus.[6]

Amici Members of Congress desire these Federal statutes and their creations—including Congress' legislative prayers—squarely upheld on the merits as fully consistent with the Establishment Clause. For the reasons set forth herein, each of these Acts, actions, and displays could be unconstitutional under the endorsement test, but would be upheld under the coercion test. The latter is the test the Constitution requires.

II. ESTABLISHMENT CLAUSE JURISPRUDENCE IS IN CHAOS REGARDING THE TEST THE CONSTITUTION REQUIRES.

A. Petitioner has ably explained the three-way circuit split over the proper test for legislative prayer. Pet. 10–15. The Second Circuit below invalidated Petitioner's prayer practice under a totality-of-the-circumstances application of the endorsement test. Pet. App. 16–17a, 20–23a. The Fourth Circuit has likewise recently examined legislative prayer under the endorsement test in four cases spanning seven years, most recently in 2011. *See Joyner*, 653 F.3d at 355. But the Ninth and Eleventh Circuits rightly reject applying the endorsement test to legislative prayer. *Rubin v.*

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[6] For example, in the stairway next to the Great Hall at the Justice Department, there is a prominent oil painting of Jesus Christ, holding his right hand toward to the viewer, apparently inviting the viewer to take his hand. *See* Library of Congress, Prints & Photographs Online Catalog, http://www.loc.gov/pictures/item/2010720202/.

City of Lancaster, 710 F.3d 1087, 1093–97 (9th Cir. 2013); *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1267, 1271 (11th Cir. 2008).[7]

But it would be a disservice to the law to mischaracterize legislative prayer as *sui generis*; its constitutionality is determined by evaluating it under the Establishment Clause. The Establishment Clause should have a single workable test, which applies regardless of whether the challenged government action is legislative prayer, other religious speech, or a passive display.

B. Just over twenty years ago, in a 5-4 opinion, this Court adopted a novel test for judging the constitutionality of state actions touching religion, one that asks "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion." *Allegheny*, 492 U.S. at 592. Justice O'Connor had previously articulated and advocated the view underlying this test, which is that the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *Id.* at 594 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). This theory was

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[7] Another circuit split is whether *Marsh* permits only nonsectarian prayers. However, there are no legal principles by which courts can reliably distinguish "sectarian" prayers from "nonsectarian." Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J.L. & PUB. POL'Y 219, 252–54 (2008).

devoid of support in America's history or law prior to that time.

The novel test produced confusion from the outset. Applying this new endorsement test, the *Allegheny* Court invalidated a nativity display in a county courthouse 5-4, but upheld a menorah display outside the courthouse by a different 6-3 majority. *Id.* at 578-79, 601-02, 620. This began a series of narrow and controversial rulings employing a subjective and unworkable test that is without historical foundation.

The Court implicitly recognized the endorsement test's unworkability in 2005, holding a Ten Commandments display at the Texas State Capitol did not violate the Establishment Clause. *Van Orden*, 545 U.S. at 681 (plurality opinion). Four Justices emphasized that applying the endorsement test would lead to the destruction or removal of a longstanding monument with religious imagery sacred to many Americans, *see id.* at 688-89,[8] a result that would astound the Framers and ratifiers of the Establishment Clause and is not remotely required by the early precedents of this Court. The plurality instead reasoned that the display should be evaluated "both by the nature of the monument and by our Nation's history." *Id.* at 686.

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[8] These Justices also noted approvingly, "So too a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross, stands outside the federal courthouse that houses both the Court of Appeals and the District Court for the District of Columbia." *Van Orden*, 545 U.S. at 689 (plurality).

Similarly, Justice Breyer explained that the Constitution "does not compel the government to purge from the public sphere all that in any way partakes of the religious. Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Id.* at 699 (Breyer, J., concurring in the judgment) (citations omitted). Concurring in the judgment, Justice Breyer maintained that in "difficult borderline cases" there is "no test-related substitute for the exercise of legal judgment." *Id.* at 700. Accordingly, there is now no clear governing rule or rationale.

C. Subsequent to *Van Orden*, a 2-2-1 circuit split has developed regarding which test governs the Establishment Clause. The Fourth and Eighth Circuits have applied Justice Breyer's legal judgment test. *See ACLU Neb. Found. v. City of Plattsmouth, Neb.*, 419 F.3d 772, 777-78, 778 n.8 (8th Cir. 2005) (*en banc*) (upholding Ten Commandments display); *Myers v. Loudon Cnty. Pub. Schs.*, 418 F.3d 395, 408 (4th Cir. 2005) (upholding daily Pledge of Allegiance recitations).[9] The Sixth and Tenth Circuits, by contrast, continue to apply the endorsement test. *See ACLU v. Mercer Cnty.*, 432 F.3d 624, 636 (6th Cir. 2005) (upholding courthouse Ten Commandments display); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1030 (10th Cir. 2009) (upholding official city seal displaying

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[9] In *Myers*, the Fourth Circuit looked to *Van Orden* even though the case involved speech, not displays. This highlights the current confusion regarding the applicable law, and the need for a uniform test for all Establishment Clause claims.

three crosses). Illustrating the extent of the confusion among the circuits, the Ninth Circuit was unable to discover which test should apply in a cross case, and purported to apply *both* tests. *See Trunk*, 629 F.3d at 1105, 1109, 1117–18.

This confusion is thus not limited to legislative prayer. It is instead generated by a faulty test governing the Establishment Clause. Legislative prayer will be adequately safeguarded only by this Court adopting a workable and principled test.

III. THE PRIMARY CAUSE OF THE CHAOS REGARDING THE ESTABLISHMENT CLAUSE IS THE UNWORKABLE, UNPREDICTABLE, AND UNGROUNDED ENDORSEMENT TEST.

The current chaos in Establishment Clause jurisprudence is primarily due to the endorsement test, which has divided this Court and confused the lower courts. It has met with widespread criticism across a broad spectrum of scholars, and confounded both the general public and officials seeking to abide by the Constitution.

The Nation's odyssey began with the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Lemon*, the Court crafted a three-pronged test, holding that government action touching religion is invalid unless (1) it has a secular purpose, (2) its primary effect "neither advances nor inhibits religion," and (3) it does not excessively entangle government with religion. *Id.* at 612–13.

It quickly became clear that adopting the *Lemon* test was a mistake. Just two years later, the Court held *Lemon*'s prongs "are no more than helpful signposts." *Hunt v. McNair*, 413 U.S. 734, 741 (1973). Members of the Court regularly criticized *Lemon*. *See, e.g.*, *Aguilar v. Felton*, 473 U.S. 402, 426–30 (1985) (O'Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 108–12 (1985) (Rehnquist, J., dissenting); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 768–69 (1976) (White, J., concurring).

A. The *Lemon* test has morphed into the endorsement test, subsuming *Lemon*'s three prongs.

Lemon's unworkability and other manifest flaws led this Court to revise it into the endorsement test, which began as a restatement of *Lemon*'s second prong—the effects prong (whether government action has the effect of advancing religion). *Allegheny*, 492 U.S. at 592. When the Court narrowly adopted the endorsement test it was thus one of three tests employed under *Lemon* to determine whether the Establishment Clause was violated. But it has since subsumed the other two prongs of *Lemon* as well.

In 1997, the Court made *Lemon*'s third prong (excessive entanglement) merely one factor in determining whether a reasonable observer would conclude government is endorsing religion. In *Agostini v. Felton*, 521 U.S. 203, 232–33 (1997), the Court relegated the entanglement prong to part of the effects prong. The Court later reaffirmed that *Agostini* thereby reduced *Lemon* to a two-step inquiry. *Mitchell v. Helms*, 530 U.S. 793, 807–08 (2002) (plurality opinion);

see also id. at 844–45, 848 (O'Connor, J., concurring in the judgment).

Eight years later the Court likewise melded the first *Lemon* purpose—the purpose prong—into the endorsement test. "By showing a purpose to favor religion, the government sends the . . . message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members . . . ." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000) (quoting in turn *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring))) (ellipses in the original, internal quotation marks omitted). As discussed in Part II.B, *supra*, this statement from *Lynch* is the rationale upon which the endorsement test is predicated: An observer's subjective belief that government is endorsing religion violates the Establishment Clause *because* nonbelievers would feel that they are not full members of the community. Justice O'Connor's *Lynch* concurrence was incorporated into the heart of the Court's holding in *Allegheny*, and is the essential core of the endorsement test. *See Allegheny*, 492 U.S. at 594. Likewise, the 5-4 majority in *McCreary* held that the purpose prong of *Lemon* is violated when the government's purpose has the effect of making nonbelievers feel like outsiders; if a government action lacks a primarily secular purpose, then its purpose is one that endorses religion.

In joining the three-Justice plurality opinion, Justice O'Connor (joined by Justice Breyer) wrote separately to emphasize the limits of her agreement with the plurality regarding their inquiry into purpose.

"The purpose behind the counties' display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer." *McCreary*, 545 U.S. at 883–84 (O'Connor, J., concurring) (citing the *Lynch* concurrence). Although Justice O'Connor joined the majority opinion, which rested upon the purpose prong of *Lemon*, by her concurrence Justice O'Connor clarified that she regards the government's purpose as just another factor in determining whether the government is endorsing religion, similar to how the endorsement test expanded to absorb entanglement in *Agostini*. The reasonable observer had theretofore been the hypothetical observer for the effects prong. Thenceforth, now too "[t]he eyes that look to purpose belong to an 'objective observer.'" *Id.* at 862 (majority opinion) (citations omitted).

The fifth vote in *McCreary*, therefore, is correctly understood as saying that whether the first prong of *Lemon* is satisfied is achieved through precisely the same test as the second prong. This then is regarded as the holding of the Court, *see Marks v. United States*, 430 U.S. 188, 193 (1977), as there were not five Justices agreeing that the Establishment Clause is violated by the original *Lemon* test's purpose prong separate from finding that a reasonable observer would believe government is endorsing religion.

Whether discussing purpose, effect, or entanglement, then, the bottom line after *Allegheny*, *Agostini*, *Mitchell*, and *McCreary* is that the Establishment Clause is violated when government endorses religion. *Lemon* can be restated as follows: A government action violates the Establishment Clause if it (1) lacks a primarily secular purpose, thus having

a purpose that gives the appearance of endorsing religion, (2) a hypothetical reasonable observer thinks the government is endorsing religion, thereby having the effect of advancing religion, or (3) excessively entangles government with religion, thereby giving the appearance of endorsing religion.

The end result, in sum, is that what began as a tripartite inquiry in *Lemon* is now a singular inquiry about endorsement. The *Lemon* test has been entirely subsumed into the endorsement test, which was the test applied by the Second Circuit below.

B. *Marsh*, *Van Orden*, and other decisions of this Court confirm that the *Lemon*/endorsement test is unworkable.

1. The Court declined to apply *Lemon* in *Marsh*. *See Marsh*, 463 U.S. at 791–95. Dissenting Justices in *Marsh* noted that legislative prayer would be invalidated under the *Lemon* test, with Justice Brennan concluding, "if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional." *Id.* at 800–01 (Brennan, J., dissenting) (footnote omitted).

The Court was correct in eschewing the *Lemon* test, and Justice Brennan was correct in observing that legislative prayer would not survive *Lemon*. This is because the *Lemon* test is unjustifiably hostile to religious faith and expression. Legislative prayers would not fail under *Lemon* because such prayers are unconstitutional. Rather, they would fail because

Lemon is not the test the Establishment Clause requires.

2. Since 1989 when the Court revised *Lemon* with the endorsement test, the Court's attempts to apply the endorsement test have resulted in splintered and narrowly-divided decisions. The results have been unpredictable, with the Court's narrow or fractured opinions eliciting vigorous dissents. This occurs both when a government action is upheld under the test, *see, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995) (plurality opinion); *id.* at 772-75 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 800 n.5 (Stevens, J., dissenting), as well as when the Court invalidates the action, *see, e.g.*, *Santa Fe*, 530 U.S. at 302; *id.* at 318 (Rehnquist, C.J., dissenting).

Even Members of the Court supporting an endorsement principle do not agree on its proper application. For example, Justice Stevens rejected Justice O'Connor's reasonable observer as a "legal fiction." *Pinette*, 515 U.S. at 800 n.5 (Stevens, J., dissenting). This "ideal human" in Justice O'Connor's theory "knows and understands much more than meets the eye." *Id.* This fictional character "comes off as a well-schooled jurist, a being finer than the tort-law model. With respect, I think this enhanced tort-law standard is singularly out of place in the Establishment Clause context." *Id.*

3. These divisions within the Court culminated in *Van Orden*, where the Court was unable to agree on a majority opinion. Justice Breyer advocated a new "legal judgment" test for "borderline" cases, in that case

certain imprecisely-defined "passive displays." *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment). This attempt at a new formulation is itself a sign that the endorsement test is not settled law and should be explicitly abandoned.

But the Court should not adopt Justice Breyer's legal judgment test, as it is no test at all; it would make every Establishment Clause challenge subject to the personal predilections of federal judges. It is even more subjective than the endorsement test, giving every judge *carte blanche* to say, "I know it when I see it," with no limiting guidance.

Such an *ad hoc* approach is unsustainable. The legal judgment approach further evinces that the *Lemon*/endorsement test must be replaced, but would not provide an acceptable replacement. The Court should instead adopt a test consistent with the original meaning and purpose of the Establishment Clause, and capable of predictably producing correct results.

C. The endorsement test has created the same hopeless disarray in the lower courts as the first iteration of *Lemon*.

In order to determine whether a display endorses religion, the endorsement test asks how the display would appear to an "objective" or "reasonable" observer, "one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." *McCreary*, 545 U.S. at 862 (citations and internal quotation marks omitted); *see also Pinette*, 515 U.S. at

777 (O'Connor, J., concurring in part and concurring in the judgment).

It is anyone's guess what this really means. For example, the circuit courts have split when applying the endorsement test to materially indistinguishable displays. The Ten Commandments in *Mercer* were displayed inside a county courthouse, alongside other documents of legal and historical import. 432 F.3d at 626. The Sixth Circuit held this display was not an endorsement of religion. *Id.* at 635-39. Then the Tenth Circuit considered a Ten Commandments display erected alongside secular monuments on a county courthouse lawn. *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 787-89 (10th Cir. 2009). Applying the same endorsement test, the Tenth Circuit invalidated the display. *Id.* at 804-09.[10] These two displays should stand or fall together under the same test. If anything, the display invalidated in *Green* should have been upheld, as it was *outside* the courthouse, whereas the display upheld in *Mercer* was *inside* the courthouse. Such conflicting and counterintuitive outcomes underscore judicial inability to apply the endorsement test in a predictable manner.

The disarray in the lower courts is not a recent development. For example, shortly after *Allegheny* upheld the display of a menorah outside a public building, the Second Circuit invalidated a similar

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[10] *En banc* was denied 6-6; the dissenters argued *Van Orden* controls. *See Green*, 574 F.3d 1235, 1235-39 (10th Cir. 2009) (Kelly, J., dissenting from denial of reh'g *en banc*).

display because of slight factual differences. *Kaplan v. City of Burlington*, 891 F.2d 1024, 1028 (2d Cir. 1989).

The lower courts were also quick to issue split decisions that conflicted with one another. For example, the year after *Allegheny*, a divided Fourth Circuit invalidated displaying a crèche, holding religious images are permissible only when offset by surrounding non-religious images. *See Smith v. City of Albermarle*, 895 F.2d 953, 955-58 (4th Cir. 1990). The very same day, a divided Sixth Circuit interpreted the endorsement test differently, permitting a stable scene used for nativity reenactments if accompanied by a prominent written disclaimer of any intent to convey a religious message. *ACLU of Ky. v. Wilkinson*, 895 F.2d 1098, 1103 (6th Cir. 1990).

It is no accident that the case law developed in the wake of *Allegheny* has been at best confusing and at worst incoherent. The endorsement test is fatally flawed by the subjective discretion that reviewing courts must exercise in determining what a "reasonable" observer would perceive and feel, and on what basis those perceptions and feelings would arise. As a result of this insoluble confusion, federal courts "remain in Establishment Clause purgatory." *Mercer*, 432 F.3d at 636.

D. Scholars across the spectrum agree that the endorsement test itself is the cause of the chronic confusion in the courts.

Further wrestling with either the original *Lemon* test or the endorsement test is unlikely to produce a workable refinement. Both tests have been subjected to

withering criticism from a broad range of scholars. Most scholars fall into one of two groups: Accommodationists believe modern doctrine puts too many restrictions on religious expression and images in public places, and strict separationists believe the opposite. *See* Klukowski, *supra*, at 224–27.

These scholars—who agree on little else about the Establishment Clause—share the view that this test is unworkable and inconsistent with the Constitution. As one scholar said of *Lemon*, the "Court has managed to unite those who stand at polar opposites on the results that the Court reaches; a strict separationist and a zealous accommodationist are likely to agree that the Supreme Court would not recognize an establishment of religion if it took life and bit the Justices." LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 163 (1986).

1. Professor McConnell, one leading accommodationist, concluded after *Allegheny* that the "Court's conception of the First Amendment more closely resemble[s] freedom *from* religion . . . than freedom *of* religion. The animating principle [is] not pluralism and diversity, but maintenance of a scrupulous secularism in all aspects of public life . . . ." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 116 (1992) (footnote omitted) ["McConnell, *Crossroads*"].

Although Justice O'Connor designed the endorsement test to achieve consistent results, *see Wallace*, 472 U.S. at 69 (O'Connor, J., concurring in the judgment), McConnell opined "this goal of consistency is the test's greatest failing," McConnell, *Crossroads*,

supra, at 148. First, "endorsement" is not workable, because "[w]hether a particular governmental action appears to endorse or disapprove religion depends on the presuppositions of the observer, and there is no 'neutral' position, outside the culture, from which to make this assessment." *Id.* The "concept of 'endorsement' therefore provides no guidance to legislatures or lower courts about what is an establishment of religion." *Id.*

McConnell attributes this to a flawed approach to the Religion Clauses. Establishment Clause jurisprudence has become so far divorced from this Court's longstanding precedents that it would be unrecognizable, not only to the Framers, but also to earlier courts. "[I]t is like stepping into a time warp to read the establishment clause opinions of the 1940's, 1950's, and 1960's." Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 933 (1986) ["McConnell, *Coercion*"]. Showcasing how far our jurisprudence has strayed from the Clause's historical purpose, McConnell asks, "Was it really Justice Brennan . . . who told us that, in deciphering the first amendment, 'the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers?'" *Id.* (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

Professor Smith focuses on the endorsement test's ahistorical roots: "If the possibility of separating church and state presented eighteenth century Americans with a genuine option, the separation of politics and religion, or of government and religion, did not." Steven

D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 966 (1989). Smith explains, "Religious premises, assumptions, and values provided the general framework within which most Americans thought about and discussed important philosophical, moral, and political issues. [Thus], Americans of the time could not seriously contemplate a thoroughly secular political culture from which religious beliefs, motives, purposes, rhetoric, and practices would be filtered out." *Id.*

Smith explains the failure to begin with a proper understanding of the Establishment Clause has led to the current judicial quagmire. "Far from eliminating the inconsistencies and defects that have plagued establishment analysis, the [endorsement test] introduce[s] further ambiguities and analytical deficiencies into [Establishment Clause] doctrine." Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 267 (1987).

2. The endorsement test likewise fares poorly among separationists. Professor Tribe criticized Justice O'Connor's *Lynch* concurrence, saying the "Court dispensed at a stroke with what should have been its paramount concern: from *whose perspective* do we answer the question whether an official crèche effectively tells minority religious groups and non-believers that they are heretics, or at least not similarly worthy of public endorsement?" Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 611 (1985) (footnote omitted). Professor Mark Tushnet concurs,

saying Justice O'Connor's conclusion in *Lynch* that the crèche at issue was not an endorsement of religion "came as a surprise to most Jews." Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 712 n.52 (1986).

Professor Shiffrin charges that the endorsement test falsely frames a facially-neutral test with the appearance of equal treatment. Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 63 (2004). Shiffrin also criticizes Justice O'Connor's conclusion that the Pledge of Allegiance is constitutional, citing this as an example of the failure of the endorsement test to stop religious establishments. *See id.* at 67-76.

Professor Gey criticizes the endorsement test's subjectivity. "In contrast to Justice Brennan, whose *Schempp* standard focuses on the objective facts of government aid to religion, Justice O'Connor converts the analysis of Establishment Clause issues into a question of subjective perceptions." Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 477. Like McConnell, Gey argues that "[t]he obvious problem with any approach that measures constitutional compliance by the *appearance* of compliance is that every individual perceives the world differently, depending on factors such as the individual's background, prejudices, sensitivity, and general personality." *Id.* at 478-79 (emphasis added). In sum, "any hypothetical 'objective' observer is only as objective as its creator wants the observer to be." *Id.* at 479.

3. Academics' assessment of the endorsement test has not improved with time. Professor Choper later opined:

> [L]ower courts, struggling to give it content, have succeeded only in producing ad hoc fact-laden decisions that are difficult to reconcile. Another unwise feature of the test, more serious because not curable, is its grounding of a constitutional violation on persons' reactions to their sense that the state is approving of religion. . . [S]ince its effect is to grant an inappropriately broad discretion to the judiciary, the endorsement approach proves unworkable . . .

Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J. L. & POL. 499, 510 (2002). Scholars across the spectrum continue to criticize the test. *See, e.g.*, PATRICK M. GARRY, WRESTLING WITH GOD: THE COURTS' TORTUOUS TREATMENT OF RELIGION 57-69 (paperback ed. 2007); Scott W. Gaylord, *When the Exception Becomes the Rule:* Marsh *and Sectarian Legislative Prayer Post-*Summum, 79 U. CIN. L. REV. 1017, 1053 (2011). Confusion reigns, and will continue to reign until this Court changes course.

E. The endorsement test has spawned excessive litigation producing a chilling effect.

The confused state of the law has a chilling effect on First Amendment interests, producing *in terrorem* effects on public officials deciding whether to permit religious speech or images in public. Government

officials cannot reasonably predict *ex ante* which actions will be held constitutional. To avoid the specter of costly litigation, officials—especially at the local level where resources are scarce—will simply deny requests that some could allege have a religious element. A test facilitating such oppressive apprehension cannot be reconciled with the foundational values protected by the First Amendment.

As Justice Kennedy predicted at the outset, the endorsement test has led to outcomes evincing "hostility [toward religion] inconsistent with our history and our precedents." *Allegheny*, 492 U.S. at 655 (Kennedy, J.). Ubiquitous expressions and displays of widely-held beliefs integral to our national fabric are regularly beset by hostile attacks divorced from the historical understanding of the Establishment Clause.

While many challenges fail on jurisdictional or procedural grounds, prudent public officials are understandably reluctant to rely on threshold issues to protect them, especially with the prospect of significant litigation costs. The path of least resistance, and due regard for taxpayers, will often counsel erring on the side of banning religious speech or symbols. In that way, even if in no other, the existing jurisprudence operates to suppress religious imagery in ways that go well beyond what this Court has ever indicated is legally required or appropriate.

IV. PRINCIPLES OF JUDICIAL RESTRAINT AND *STARE DECISIS* DO NOT PROTECT THE *LEMON*/ENDORSEMENT TEST.

Four Terms ago in *Citizens United* the Court held that *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), "was a significant departure from ancient First Amendment principles. We agree with that conclusion and hold that *stare decisis* does not compel the continued acceptance of *Austin*." *Citizens United v. FEC*, 558 U.S. 310, 319 (2010) (internal citation and quotation marks omitted). The Court proceeded to overrule *Austin* and part of *McConnell v. FEC*, 540 U.S. 93 (2003).

The Constitution and the Nation are better off for this Court's restoring First Amendment principles under the Free Speech Clause, and the Court should do likewise here to restore First Amendment principles under the Establishment Clause. A straightforward application of this Court's reasoning in *Citizens United* compels the conclusion that the endorsement test and its originating *Lemon* test should be overruled.

Stare decisis requires precedent be upheld "unless the most convincing of reasons demonstrates that adherence to it puts [the Court] on a course that is sure error." *Citizens United*, 558 U.S. at 362. This case demonstrates such error.

A. The endorsement test is the archetypal unworkable test.

Among the foremost reasons for admitting that adopting a decision was error is that the rule has

proven unworkable. *Stare decisis* does not require the Court to revise the theoretical basis of a prior decision "in order to cure its practical deficiencies. To the contrary, the fact that a decision has proved 'unworkable' is a traditional ground for overruling it." *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009).

If *amici*'s brief proves only one point, it is that the endorsement test from *Allegheny* is manifestly unworkable. And the reason the Court was narrowly persuaded to adopt the endorsement test is that the original *Lemon* test was unworkable—as seen in the Court's refusal to apply *Lemon* in *Marsh*. The *Lemon*/endorsement approach is indeed a textbook illustration of an unworkable test, commending itself to law professors across the legal spectrum as an example for students of an irredeemable and unsalvageable test, one that never should have been adopted. For that reason alone, the Court should overrule the endorsement test.

B. Other *stare decisis* factors likewise counsel this test should be overruled.

"Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Id.* at 792–93.

The endorsement test is of recent vintage, adopted twenty-four years ago. And it supplanted the *Lemon* test, which was only eighteen years old. What is rooted in antiquity, by contrast, is Congress' legislative-prayer practice. That practice—materially similar to the Town

of Greece's—is older than the Republic, but as demonstrated below cannot survive the endorsement test.

Nobody seriously relies on the endorsement test, either for legislative prayer or anything else. They do not because they cannot; this test revolves around a hypothetical observer who selectively is aware of certain facts but ignorant of others, and as seen in the cases cited above leads to different courts reaching diametrically opposed conclusions regarding essentially-identical facts.

Nor should there be serious doubt that *Allegheny* was well-reasoned. The Court's fractured conclusions forbidding the crèche but allowing the menorah was just the beginning, as again the case law discussed in Part III shows. A test under which public officials cannot know *ex ante* whether their speech or display will survive is not well-reasoned.

These arguments against *stare decisis* apply with particular force in this case. "This Court has not hesitated to overrule decisions offensive to the First Amendment." *Citizens United*, 558 U.S. at 363 (internal citation and quotation marks omitted).

C. It is necessary to articulate a general rule to produce a well-reasoned opinion in this case.

The judiciary's practice of avoiding unnecessarily broad constitutional rulings cannot trump this Court's "obligation faithfully to interpret the law. . . [The Court] cannot embrace a narrow ground of decision

simply because it is narrow; it must also be right." *Id.* at 375 (Roberts, C.J., concurring). That is why in this case the Court should not carve out an *ad hoc* rule justifying legislative prayer, and instead uphold these prayers under a general establishment rule.

"When constitutional questions are indispensably necessary to resolving the case at hand, the court must meet and decide them." *Id.* (citation and internal quotation marks omitted). It is "indispensably necessary" to a well-reasoned opinion here that the Court not only affirm Petitioner's legislative-prayer practice is constitutional; the Court must articulate a rule of law governing the Establishment Clause under which Petitioner's practice passes muster. Rather than rest upon legislative prayer's "unique history," the Court should adopt a clear rule that explains *why* legislative prayer is consistent with the Constitution's text and history.

D. Overruling the endorsement test promotes predictable legal principles, reliance on judicial decisions, and the integrity of the judicial process.

"*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

The Establishment Clause's tumultuous course since the endorsement test's adoption is the polar opposite of "consistent development." That in part is

why the test has fostered no reliance, and since the fictional "reasonable observer" in each case bears a striking resemblance to the presiding judge—often deciding cases contrary to other judges in similar cases—the endorsement test undermines, rather than contributes to, the integrity of the judicial process.

The Court has greater latitude to overturn precedent in constitutional cases. *Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring) (citing *United States v. Scott*, 437 U.S. 82, 101 (1978)). Congress cannot fix this situation by statute; the Court adopted a deeply-flawed test, and only the Court can replace it.

In balancing the "importance of having constitutional questions *decided* against the importance of having them *decided right*," the Court "must keep in mind that *stare decisis* is not an end in itself. It is instead 'the means by which [the Court ensures] that the law will not merely change erratically, but will develop in a principled and intelligible fashion.'" *Id.* at 378 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)). The Establishment Clause thus requires a test that reliably produces comprehensible results. The endorsement test does not.

E. Retaining the endorsement test does more to damage the rule of law than advance it.

"[I]f adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its *stare decisis* effect is also diminished." *Id.* at 379. This case presents an "unusual circumstance when fidelity to" precedent does more to damage the "constitutional ideal" of the rule of law "than to advance it." *Id.* at 378.

Accordingly, restoring the "intrinsically sounder doctrine established in prior cases" will "better serv[e] the values of *stare decisis* than would following" the errant precedent. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231 (1995).

V. THIS COURT SHOULD REPLACE THE DEFICIENT *LEMON*/ENDORSEMENT TEST WITH THE HISTORICALLY-GROUNDED COERCION TEST DEFENDED BY FOUR JUSTICES IN *ALLEGHENY* AND IMPLICITLY APPLIED IN *MARSH*.

The Court should therefore restore order to its Establishment Clause jurisprudence. The legal question of the proper test is squarely presented, and the appropriate alternative rule is ready at hand:

> [G]overnment may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so."

Allegheny, 492 U.S. at 659 (Kennedy, J.) (quoting *Lynch*, 465 U.S. at 678) (brackets in the original).

A. The coercion test defended by four Justices in *Allegheny* comports with the original meaning and historical justifications of the Establishment Clause.

This coercion principle was at the heart of the First Congress' deliberations when they were formulating

religious liberty protection in what would eventually become the First Amendment. At its ratification convention for the Constitution, Virginia proposed:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefor all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience.

Proposed Amendment, *in* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 56 (2d ed. 2006). Two other states proposed almost identical language. *Id.* So the first such language revolved entirely around coercion, as the ratifiers' focus was on freedom of conscience.

In the First Congress, James Madison from Virginia—heavily involved in the aforementioned convention—introduced: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 ANNALS OF CONG. 434 (1789). This language—again primarily focused on protecting against government coercing anyone against their conscience—was referred to committee.

On August 15, 1789, the full House took up the issue. The ensuing debate includes:

> Mr. Carroll—As the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand . . . . Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and *enforce the legal observation of it* by law, nor *compel* men to worship God in any manner contrary to their *conscience*. . . [This is because some states feared the] power of Congress to make all laws necessary and proper to carry into execution the Constitution and the laws made under it, enabled them to make laws of such a nature as might *infringe the rights of conscience*, and establish a national religion . . . . [Mr. Huntington] hoped, therefore, the amendment would be made in such a way as to *secure the rights of conscience*, and a free-exercise of the rights of religion, but not to patronise those who professed no religion at all. Mr. Madison . believed that the people feared one sect might obtain pre-eminence, or two combine together, and establish a religion to which they would *compel others to conform*.

1 ANNALS OF CONG. 757–59 (1789) (emphases added). The theme throughout the debates is protecting persons from government compulsion, violating their conscience on religious matters.

This is consistent with the vast body of literature known to the First Congress. *See, e.g.*, JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785) ("The Religion then of every man must be left to the conviction and conscience of every

man; and it is the right of every man to exercise it as these may dictate. . ."); *see also* MCCONNELL, *supra*, at 36–43 (collecting sources). The historical understanding is that the Federal Government violates the Establishment Clause by coercing any person to participate in a religious exercise or profess support for a belief that his conscience does not embrace.

B. *Marsh* is easily understood as having applied this coercion test.

This coercion test is implicitly the rule the Court employed in *Marsh*. Courts are to look for evidence of an "impermissible motive" or exploitation to proselytize a single faith or disparage other faiths. *Marsh*, 463 U.S. at 793–95. Where these are absent, the prayer practice is constitutional.

Coercion is foundational to this inquiry. Proselytizing—*i.e.*, calling on your audience to change religions—is almost never coercive. However, it could be when someone with the voice of government publicly calls on citizens to convert to the governmental-speaker's religion at the outset of a policy discussion. It could intimidate nonbelievers into thinking their petitions will be disfavored if they refuse to comply.[11] Likewise, hearing the government condemn your personal faith in such a setting might cross the line, giving rise to the same fears.

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[11] Alternatively, proselytizing one religion can be government so directly benefiting that religion as to effectively establish a state religion.

Thus, when a court asks whether there is evidence of government exploiting the prayer opportunity to proselytize or disparage, that court is essentially asking, "Is government coercing anyone through these prayers?" *Marsh* applied the coercion test.

C. Replacing the endorsement test with the coercion test will harmonize the Establishment Clause with the remainder of the First Amendment.

1. This case is an appropriate vehicle for revisiting both the first *Lemon* test and the current endorsement test. The Court declined to apply *Lemon* in *Marsh*, and the dissenting Justices in *Marsh* correctly noted that legislative prayer would not survive *Lemon*. This is not because legislative prayer violates the Establishment Clause; it is rather because the *Lemon* test is not the test the Establishment Clause requires. Yet now *Lemon* has reared its head in legislative-prayer jurisprudence, and is centrally implicated in this case.

Specifically, the version of *Lemon* at issue in this case is the endorsement test. First the Fourth Circuit, and now the Second Circuit, have made the endorsement test the controlling rule in legislative prayer cases. The propriety of the endorsement test is inextricably implicated in this case. The Court should do more than hold the endorsement test never applies to legislative prayer cases, and instead hold that the endorsement test never applies in *any* Establishment Clause case. The endorsement test and its underlying *Lemon* test should be explicitly abandoned.

2. The endorsement test was a novelty when Justice O'Connor devised it in her *Lynch* concurrence, 465 U.S. at 687-91, and would never have been adopted were it not for the manifest unworkability of the *Lemon* test's initial formulation. The endorsement test was unprecedented when the Court narrowly adopted it in *Allegheny*. That adoption was clearly a mistake, as Justice Kennedy demonstrated in his *Allegheny* dissent. The test immediately produced conflicting results in almost indistinguishable cases. And since *Van Orden* rejected, modified, or muddied the endorsement test sixteen years later, Establishment Clause jurisprudence has become so riddled with inconsistencies and uncertainties as to render it all but incoherent. The current train wreck involving legislative prayer is the latest and perhaps most egregious example. The endorsement test is unworkable, divorced from longstanding principles, and not the kind of settled law that can engender substantial reliance.

Twenty-four years of experience have richly confirmed Justice Kennedy's initial diagnosis, and provided a wealth of reasons to return to the long-established principles that he and the other dissenters defended: "Government may not coerce anyone to support or participate in any religion or its exercise" or "give direct benefits to religion in such a degree that it in fact establishes a state religion or religious faith, or tends to do so." *Allegheny*, 492 U.S. at 659 (Kennedy, J.) (citation, internal quotation marks and alterations omitted).

There is perhaps no element of Establishment Clause jurisprudence that has deviated further from

the historical purpose of the Clause than the endorsement test. Replacing the recently-minted endorsement test would correct an unnecessary and unhelpful deviation. Not so long ago, government coercion was central to this Court's understanding of religious establishment. *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The "Court's decision to abjure coercion as an element of an establishment clause claim essentially was without explanation." McConnell, *Coercion*, *supra*, at 935.

The Court's adoption of the endorsement test in 1989 formalized this deviation. Restoring coercion as the requisite principle of Establishment Clause violations would bring the law back to the purpose it was meant to serve when our Nation began, a purpose with which this Court was perfectly comfortable through most of its history.

3. The coercion test would also effectuate an underlying principle running throughout the several rights secured by the First Amendment: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Forbidding government coercion of thought and expression is the principle underlying the First Amendment. *See, e.g.*, *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013). That principle is the core and overriding concern of the Religion Clauses—safeguarding religious

liberty—holding that public acknowledgements of religion do not offend the Establishment Clause absent coercion or official establishment. That is why the coercion test is the one the Establishment Clause requires.

This approach—rather than the endorsement test—is consistent with the original meaning and historical purpose of the First Amendment. It harmonizes the Establishment Clause with the other provisions of the First Amendment. It is perfectly capable of principled and consistent application by the courts. And its restoration will prevent reasonable observers from concluding that this Court's jurisprudence "border[s] on latent hostility toward religion." *Allegheny*, 492 U.S. at 657 (Kennedy, J.).

CONCLUSION

The judgment of the Court of Appeals should be reversed, and this Court should replace the *Lemon*/endorsement test with the historically-grounded coercion test supported by four Justices of the Court twenty-four years ago.

Respectfully submitted,

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Members of Congress

August 2, 2013

APPENDIX

APPENDIX

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Appendix A: List of Members of the House of Representatives joining in the *amici curiae* brief 1a

APPENDIX A

Eighty-five (85) Members of the United States House of Representatives currently serving in the 113th Congress have joined this brief as *amici curiae* in support of Petitioner Town of Greece. This group is bipartisan, and represents a variety of faiths.

These Members of Congress are the Honorable:

1. Rep. Robert B. Aderholt of Alabama
2. Rep. Michele Bachmann of Minnesota
3. Rep. Andy Barr of Kentucky
4. Rep. Kerry L. Bentivolio of Michigan
5. Rep. Gus M. Bilirakis of Florida
6. Rep. Rob Bishop of Utah
7. Rep. Diane Black of Tennessee
8. Rep. Marsha Blackburn of Tennessee
9. Rep. Kevin Brady of Texas
10. Rep. Jim Bridenstine of Oklahoma
11. Rep. Mo Brooks of Alabama
12. Rep. Paul C. Broun of Georgia
13. Rep. Tom Cole of Oklahoma

14. Rep. Chris Collins of New York
15. Rep. Doug Collins of Georgia
16. Rep. K. Michael Conaway of Texas
17. Rep. Kevin Cramer of North Dakota
18. Rep. John A. Culberson of Texas
19. Rep. Ron DeSantis of Florida
20. Rep. Jeff Duncan of South Carolina
21. Rep. Blake Farenthold of Texas
22. Rep. Stephen Fincher of Tennessee
23. Rep. Chuck Fleischmann of Tennessee
24. Rep. John Fleming of Louisiana
25. Rep. Bill Flores of Texas
26. Rep. J. Randy Forbes of Virginia
27. Rep. Jeff Fortenberry of Nebraska
28. Rep. Virginia Foxx of North Carolina
29. Rep. Trent Franks of Arizona
30. Rep. Scott Garrett of New Jersey
31. Rep. Phil Gingrey of Georgia
32. Rep. Louie Gohmert of Texas
33. Rep. Bob Goodlatte of Virginia
34. Rep. Tim Griffin of Arkansas

35. Rep. Gregg Harper of Mississippi
36. Rep. Andy Harris of Maryland
37. Rep. Vicky Hartzler of Missouri
38. Rep. Jeb Hensarling of Texas
39. Rep. Richard Hudson of North Carolina
40. Rep. Tim Huelskamp of Kansas
41. Rep. Randy Hultgren of Illinois
42. Rep. Bill Johnson of Ohio
43. Rep. Sam Johnson of Texas
44. Rep. Walter B. Jones of North Carolina
45. Rep. Jim Jordan of Ohio
46. Rep. Mike Kelly of Pennsylvania
47. Rep. John Kline of Minnesota
48. Rep. Doug LaMalfa of California
49. Rep. Doug Lamborn of Colorado
50. Rep. James Lankford of Oklahoma
51. Rep. Robert E. Latta of Ohio
52. Rep. Bill Long of Missouri
53. Rep. Mike McIntyre of North Carolina
54. Rep. Mark Meadows of North Carolina
55. Rep. Luke Messer of Indiana

56. Rep. Jeff Miller of Florida
57. Rep. Markwayne Mullin of Oklahoma
58. Rep. Randy Neugebauer of Texas
59. Rep. Kristi Noem of South Dakota
60. Rep. Alan Nunnelee at Mississippi
61. Rep. Pete Olson of Texas
62. Rep. Steven Palazzo of Mississippi
63. Rep. Stevan Pearce of New Mexico
64. Rep. Robert Pittenger of North Carolina
65. Rep. Joseph R. Pitts of Pennsylvania
66. Rep. Ted Poe of Texas
67. Rep. Mike Pompeo of Kansas
68. Rep. Bill Posey of Florida
69. Rep. Tom Price of Georgia
70. Rep. Tom Reed of New York
71. Rep. Phil Roe of Tennessee
72. Rep. Todd Rokita of Indiana
73. Rep. Keith Rothfus of Pennsylvania
74. Rep. Matt Salmon of Arizona
75. Rep. Steve Scalise of Louisiana
76. Rep. Austin Scott of Georgia

77. Rep. Adrian Smith of Nebraska
78. Rep. Steve Southerland of Florida
79. Rep. Michael R. Turner of Ohio
80. Rep. Tim Walberg of Michigan
81. Rep. Daniel Webster of Florida
82. Rep. Brad Wenstrup of Ohio
83. Rep. Lynn Westmoreland of Georgia
84. Rep. Joe Wilson of South Carolina
85. Rep. Rob Woodall of Georgia

AMICUS CURIAE BRIEF

No. 12-696

Supreme Court, U.S.
FILED
SEP 23 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TOWN OF GREECE, NEW YORK,
Petitioner,

v.

SUSAN GALLOWAY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PAUL FINKELMAN, STEVEN K. GREEN, MICHAEL I. MEYERSON, JOHN A. RAGOSTA, AND 36 OTHER LEGAL HISTORIANS AND SCHOLARS OF RELIGION AND AMERICAN LAW AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

No. 12-696

TOWN OF GREECE, NEW YORK,

Petitioner,

v.

SUSAN GALLOWAY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PAUL FINKELMAN, STEVEN K. GREEN, MICHAEL I. MEYERSON, JOHN A. RAGOSTA, AND 36 OTHER LEGAL HISTORIANS AND SCHOLARS OF RELIGION AND AMERICAN LAW AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

Amici are historians and legal scholars who specialize in constitutional history and religious freedom.[1] They have substantial expertise in the history of the Establishment Clause and related issues. Amici have a

[1] Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici curiae or their counsel, made any monetary contribution to the preparation or submission of this brief.

professional interest in the proper disposition of those issues and believe that the Court should decide this case based on a complete and accurate historical record.

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John A. Ragosta, Ph.D., is resident fellow at the Virginia Foundation for the Humanities and an author and historian of early American history and religion. He has published *Wellspring of Liberty: How Virginia's Religious Dissenters Helped Win the American Revolution and Secured Religious Liberty* (Oxford, 2010) and *Religious Freedom: Jefferson's Legacy, America's Creed* (Virginia, 2013), as well as numerous articles.

These four scholars are joined by the following amici, among who include biographers of the Founders, editors and former editors of the papers of the founding generation, former presidents of national scholarly societies and organizations, and winners of numerous awards and prizes, including the George Washington Book Prize and the Pulitzer Prize:

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Framers of the Constitution understood that religion was central to the social, political, and cultural life of the new republic. They also believed, however, that religion should be a force to unite, not divide, the nation. Because of this, the Framers were particularly concerned about governmental action that had the potential to exclude members of the political community based on religious views or to coerce individuals into conforming to the beliefs of the majority, thus potentially fracturing the nation along religious lines and violating individual rights of conscience.

The Framers struggled to accommodate religion and the government in complex and nuanced ways. Their approach to the charged question of religious speech by government officials demonstrates this point. By and large, the Framers did not seek to banish religious language from political discourse. But their approval or condemnation of such speech depended crucially on the *context* of the speech as well as its *content*. Amici's study of the history of the Founding has identified several categories of religious speech, each of which was approached differently by the Framers and each of which sheds light on distinct features of the original understanding of the Establishment Clause.

First, the Framers accepted personal religious speech by government officials, a category that included, for example, Presidents' personal invocations for divine guidance in inaugural addresses, especially when that speech was nonsectarian. Second, the Framers viewed government conduct resulting in ministering to the spiritual needs of government officials—such as hiring legislative or military chaplains—as raising some concerns, but such conduct was accepted by many so long as it did not amount to coercion or otherwise infringe the religious liberties of private citizens. Third, many Founders, including Jefferson and Madison, steadfastly opposed any official government religious proclamations directed to the public. Even those Framers, like Washington, who accepted some form of government religious speech believed that it should never have the purpose or effect of endorsing a sectarian position or excluding members of the political community based on their religious beliefs, because such outcomes were also inconsistent with individual rights of conscience.[2]

This historical account reveals the profound error in Petitioner's broad contention that any "civic acknowledgment of religious belief" or "prayer" by government officials would have been accepted by the Framers. Pet. Br. 35. Instead, the historical record establishes that, for most Framers, the appropriateness (or not) of government religious speech was a question of circumstance, not absolutes. That informs application of the Establishment Clause here in two ways.

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[2] State officials engaged in certain religious speech, but because they were not then bound by the Establishment Clause, *see* Ragosta, *Religious Freedom: Jefferson's Legacy, America's Creed* 117-128 (2013) [hereinafter Ragosta, *Religious Freedom*], their practices shed little light on the original understanding of the Establishment Clause, *see, e.g.*, Indiana et al. Br. 6-9.

I. In the context of official governmental speech directed to the public, the Framers were deeply suspicious of sectarian religious language, and they were careful to ensure such speech united rather than divided. Their aversion to sectarianism was pragmatic as well as philosophical. They were familiar with the wars of religion, the history of religious persecutions, and the corrosive effect that state patronage had on religion, and vice versa. *See* Ragosta, *Wellspring of Liberty: How Virginia's Religious Dissenters Helped Win the American Revolution and Secured Religious Liberty* 138 (2010). They also understood, as this Court has explained, that "sectarianism" is "often the flashpoint for religious animosity." *Lee* v. *Weisman*, 505 U.S. 577, 588 (1992).

The words the Framers used in national charters, presidential addresses, and prayer proclamations—that is, speech directed at the public analogous to the speech at issue in this case—demonstrate the Framers' belief that such religious language should be universal and nonsectarian. To be sure, the early Presidents did not shy from religious rhetoric, but the public religious speech of Presidents Washington, Jefferson, and Madison reflects an overriding concern that religion should unite, not divide, the nation. These Framers sought "to find a civil vocabulary that could encompass all people, regardless of their faith." Meyerson, *Endowed by Our Creator: The Birth of Religious Freedom in America* 12 (2012).

II. In addition to uniting around the principle that religious speech directed to the public should be unifying and non-sectarian, the Framers shared a philosophical commitment to the rights of conscience. This led the Framers to reject emphatically coerced religious observance, in any form. Petitioner is therefore correct

to identify "coercion" as a central evil the Establishment Clause was enacted to combat, but wrong to define the concept as narrowly as it does. Pet. Br. 36.

By the time the First Amendment was adopted, the Framers' concerns regarding establishment and protecting individual rights of conscience from coercion extended to any government practice that might exclude members of the political community based on religious belief or pressure individuals to conform to the majority. For some of the Framers, most prominently, Jefferson and Madison, this risk of exclusion or coercion occurred whenever the government made official proclamations regarding religion. Other Framers, such as Washington, demonstrated by unwavering practice that they viewed official sectarian proclamations aimed at the public as contradicting the American understanding of freedom of religion. The formative debates regarding the roles of government and religion in the 1770s and 1780s show that the Framers' concepts of coercion and establishment were expansive.

This understanding of coercion informs application of the Establishment Clause here. Many Framers accepted Congress's use of legislative chaplains because the potential of that practice to coerce citizens was minimal: the Framers understood that chaplains would minister to the spiritual needs of legislators, not of the general public. The Framers' diffident acceptance of the limited practice of legislative prayer therefore sheds no light on whether they would have tolerated overtly sectarian religious speech directed at the public, particularly in a captive situation in which citizens must observe and face pressure to participate in religious worship to engage the government for some public purpose.

ARGUMENT

I. LEADING FRAMERS WIDELY BELIEVED THAT GOVERNMENTAL RELIGIOUS SPEECH, IF ALLOWED, SHOULD BE NONSECTARIAN

The Founders' understanding of the relationship between religion and government was complicated and nuanced. We know that many Framers accepted some religious activity by government officials—though, as discussed below, the two Founders most central to the Religion Clauses, Jefferson and Madison, went far in rejecting such activity. Legislative prayer was one such activity. As explained by this Court in *Marsh* v. *Chambers*, the First Congress appointed chaplains to minister to the spiritual needs of legislators, including through prayer. *See* 463 U.S. 783, 787-788 (1983).

We also know that the Framers followed a circumspect approach regarding other types of government religious activity. The words they employed in government charters, presidential addresses, and prayer proclamations—that is, speech directed to the public—evinced a belief that such speech, if acceptable at all, should be thoroughly nonsectarian. In other words, the Framers agreed both that, particularly in speech directed to the public, the government should not "advance any one, or ... disparage any other, faith or belief," *Marsh*, 463 U.S. at 794-795, and that no government conduct should "have the effect of affiliating the government with any one specific faith or belief," *County of Allegheny* v. *ACLU*, 492 U.S. 573, 603 (1989). Above all, they believed that government religious speech should use cautious language that "expressed reverential concepts without implying that those not of a favored faith were second-class citizens." Meyerson, *supra*, at 271.

A. In Public Settings, Leading Framers Used General, Nonsectarian Religious Language

1. Government charters

Important foundational documents drafted by the Framers in the years leading up to the First Amendment evidence an obvious interest in avoiding the use of sectarian religious language and provide compelling evidence that the Framers consciously departed from earlier practices and "strove to find a civil vocabulary that could encompass all people, regardless of their faith." Meyerson, *supra*, at 12.

At the state level, Jefferson's Virginia Act for Establishing Religious Freedom powerfully illustrates the point. This statute—a state precursor to the federal Establishment Clause—declared in its Preamble that "Almighty God hath created the mind free" and that governmental penalties for religious beliefs "are a departure from the plan of the Holy author of our religion." Act for Establishing Religious Freedom, in 5 *The Founders' Constitution* 84 (Kurland & Lerner eds., 1987). The Virginia legislature rejected a separate proposal that would have included a sectarian version of that sentence—namely, "a departure from the plan of Jesus Christ, the holy author of our religion." Jefferson, *Autobiography*, in 1 *The Writings of Thomas Jefferson* 62 (Ford ed., 1892-1899) [hereinafter *WTJ*].

Madison and Jefferson each recognized the difference and the significance of the omission of the reference to "Jesus Christ." Madison explained that including "Jesus Christ" would "imply a restriction of the liberty defined in the Bill, to those professing his religion only." Madison, *Detatched Memoranda*, in Fleet, *Madison's "Detatched Memoranda,"* 3 Wm. & Mary Q. 534, 554-560 (1946). Similarly, Jefferson wrote that omitting

"Jesus Christ" demonstrated an intent "to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination." Jefferson, *Autobiography*, in 1 *WTJ* 62. By contrast, the Act's reference to "Almighty God" was designed to encompass persons of all faiths and even non-believers, since "God" could refer to "Nature's God," a non-deity. *See* Green, *The Second Disestablishment: Church and State in Nineteenth-Century America* 53-54 (2010). Madison's and Jefferson's views are particularly important, of course, because of their instrumental role in formulating the intellectual underpinnings of the Establishment Clause. *See* Ragosta, *Religious Freedom* 102; *see also, e.g.*, *Everson* v. *Board of Educ.*, 330 U.S. 1, 11, 13, 33 (1947); *McGowan* v. *Maryland*, 366 U.S. 420, 437 (1961).

A similar ecumenical approach is enshrined in federal founding documents. In fact, "[t]he organic documents of the new national government contain only the vaguest references to God or divine Providence[.]" Green, *supra*, at 53. Although the Continental and Confederation Congresses were not always sensitive to the need to avoid sectarian language, the Declaration of Independence is an early and prominent example of the Founders' evolving commitment to religious inclusion. The Declaration's memorable phrase "endowed by their Creator, with certain unalienable rights" noticeably avoids affiliation of the nation with any religious sect. Similarly, the Declaration's reference to the "laws of nature and of nature's God" illustrates the Framers' careful avoidance of secular or Christian language.

The Constitution is even further removed from religious acknowledgment. The nation's founding charter does not recognize or reference a God or Creator at all. Green, *supra*, at 55. This omission was not an accident,

and some constitutional delegates and members of state ratifying conventions objected. *See* Ragosta, *Religious Freedom* 155-156. The Framers nevertheless chose not to include any reference to God in the Constitution. In fact, the only reference to religion in the original Constitution is a prohibition on religious qualifications for office—a clause designed to protect religious outsiders. *See* Green, *supra*, at 55-56.[3]

2. Public speech by the early Presidents

Public religious speech by the early Presidents further reveals the Framers' commitment to inclusion and the desire to avoid stirring sectarian divisions. With the exception of Adams, all the early Presidents carefully chose their public religious language, studiously limiting reference to any particular religion, including Christianity. The Framers' aversion to sectarianism was most pronounced when an official was speaking publicly on behalf of the government in an official capacity—for example, when issuing religious "proclamations." As Madison stated, "[i]n their individual capacities, as distinct from their official station, [officials] ... might unite in [religious] recommendations of any sort whatsoever." *Detatched Memoranda* 560. On the whole and in any public context, however, the early Presidents chose religious language that reflected a paramount concern with uniting, not dividing, the new republic.

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[3] Petitioner points (at 34-35) to what it calls the "Oath Clauses" as evidence of a religious requirement in the Constitution, but it overlooks that the Framers chose to require an "Oath *or Affirmation*" specifically to avoid writing a religious test into the document. *See* Meyerson, *supra*, at 138-144.

a. President Washington

President Washington was greatly concerned with the tendency of religious disputes to divide a nation. As he wrote to a friend in Ireland: "Religious controversies are always productive of more acrimony and irreconcilable hatreds than those which spring from any other cause[.]" Letter from Washington to Newenham (June 22, 1792), in 10 *The Papers of George Washington: Presidential Series [1788-1797]* 493 (Haggard & Mastromarino eds., 2002) [hereinafter *PGW: Presidential*]. Washington's concern was not merely in avoiding conflict, but also unifying the country. He believed that each individual must be treated as an equal member of society and that "every man, conducting himself as a good citizen ... ought to be protected in worshipping the Deity according to the dictates of his own conscience." Letter from Washington to the United Baptist Churches of Virginia (May 1789), in 2 *PGW: Presidential* 424.

Washington also appreciated his role as a national symbol and understood that his actions would set important precedents. Starting with his first inaugural address, Washington helped to shape a governmental tradition of using inclusive religious language. An early draft of that address, written by his secretary David Humphreys, was rejected and rewritten. Humphreys wanted Washington to use distinctively Christian language, referring to "the blessed Religion revealed in the word of God." Washington, *Undelivered First Inaugural Address: Fragments* (Apr. 1789), in 2 *PGW: Presidential* 166.[4] But the final address, which contains

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[4] Eighteenth-century ministers frequently contrasted "natural religion" with the "revealed" religion of Christianity. *See, e.g.*, 1 Pyle, *One Hundred and Twenty Popular Sermons* 81 (1789) ("All

abundant religious imagery, included no language uniquely Christian. Instead, Washington spoke universally, explaining that it would be "peculiarly improper to omit in this first official Act, my fervent supplications to that Almighty Being who rules over the universe." Washington, *First Inaugural Address*, in 1 *A Compilation of the Messages and Papers of the Presidents* 52 (Richardson ed., 1896) [hereinafter *CMPP*].

Likewise, when Washington issued his Thanksgiving proclamation on October 3, 1789, he again avoided sectarian language in favor of religiously inclusive language. In this respect, he diverged from the sectarian approach followed by the Continental Congress in a 1777 proclamation, which urged "the good people ... [to] join the penitent confession of their manifold sins ... that it may please God, through the Merits of Jesus Christ." 9 *Journals of the Continental Congress, 1774-1789*, at 855 (1904-1937). Washington, by contrast, recommended that Americans be devoted "to the service of that great and glorious Being, who is the beneficent Author of all the good that was, that is, or that will be." Washington, *Thanksgiving Proclamation* (Oct. 3, 1789), in 4 *PGW: Presidential* 131-132. Though unmistakably religious, Washington's proclamation demonstrated awareness of the diversity of religious belief across the nation and the need to respect religious freedom.

In addition to avoiding sectarian language, Washington believed the government had a broad duty to protect all individuals from religious oppression. In a letter to Quakers in October 1789, he declared that, as President, he was obligated to respect their religious

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adoration of any being ... except the supreme sovereign of the universe, is contrary even to the primitive religion of nature; but especially to the revealed religion of the gospel").

rights and protect them from harm: "Government being, among other purposes, instituted to protect the Persons and Consciences of men from oppression, it certainly is the duty of Rulers, not only to abstain from it themselves, but according to their Stations, to prevent it in others." Letter from Washington to the Society of Quakers, in 4 *PGW: Presidential* 266. He added that "the Conscientious scruples of all men should be treated with great delicacy & tenderness, and it is my wish and desire that the Laws may always be as extensively accommodated to them, as a due regard to the Protection and essential Interests of the Nation may Justify, and permit." *Id.*

Throughout his presidency, various clergymen attempted to elicit statements from Washington indicating a preference for Christianity. In each case, Washington refused, revealing his firm dedication to avoid becoming a symbol for a particular religion. *See* Green, *supra*, at 72-73. On October 28, 1789, for example, the Presbytery of the Eastward, from Massachusetts and New Hampshire, wrote to Washington to complain that the Constitution lacked any Christian references: "Among these we never considered the want of a religious test, that grand engine of persecution in every tyrant's hand: But we should not have been alone in rejoicing to have seen some Explicit acknowledgement of the only true God and Jesus Christ, whom he hath sent inserted somewhere in the Magna Charta of our country." Letter from the Presbytery of the Eastward to Washington (Oct. 28, 1789), in 4 *PGW: Presidential* 275.

In response, Washington defended the Constitution's absence of "[e]xplicit" Christian language. He explained that religion did not need governmental assistance: "You will permit me to observe that the path of true piety is so plain as to require but little political

direction. To this consideration we ought to ascribe the absence of any regulation, respecting religion, from the Magna-Charta of our country." Letter from Washington to the Presbytery of the Eastward (Nov. 2, 1789), in 4 *PGW: Presidential* 274. Washington drew a line between sectarian religion and government: "To the guidance of the ministers of the gospel this important object is, perhaps, more properly committed." *Id.* He also gently admonished the clergy that "it will be your care to instruct the ignorant, and to reclaim the devious—and, in the progress of morality and science, to which our government will give every furtherance, we may confidently expect the advancement of true religion, and the completion of our happiness." *Id.*

Notably, Washington avoided mentioning or endorsing "Christianity" or "Jesus Christ," while specifically pointing out that promoting religion is for ministers, not the government. Washington's response further makes clear the limited role for government in matters of religion: Government, he wrote, is not responsible for furthering religion, but will give "every furtherance" to the "the progress of morality and science." It was through such secular pursuits, Washington believed, that government could best advance religion, leaving sectarian matters to clergy.

Washington's commitment to religious inclusion extended to the end of his presidency. For example, Washington edited Alexander Hamilton's draft for his Farewell Address, which contained specific references to religion, to insure that only inclusive religious language was used. Letter from Hamilton to Washington (July 31, 1796), in 20 *Papers of Alexander Hamilton* 170 (Syrett et al. eds., 1961). Washington's final version stated: "Let us with caution indulge the supposition that morality can be maintained without religion.

Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." Washington, *Farewell Address*, in 1 *CMPP* 227. In the original draft, however, the prediction of an end to "national morality" without religion, was followed by a rhetorical question: "Does it not require the aid of a generally received and divinely authoritative Religion?" Washington deleted that line, and thus removed the Christian reference to "received ... religion." *See* Meyerson, *supra*, at 197-198.

During the Revolution, General Washington had been concerned with ensuring that religious differences did not raise "the smallest uneasiness & jealousy among the Troops." Letter from Washington to Hancock (June 8, 1777), in 9 *The Papers of George Washington: Revolutionary War Series [1775-1783]* 645 (Chase et al. eds., 1985-2010). This was due, in part, to the vast range of Christian denominations found among his troops, along with Jews and some deists. That a Jewish officer, David Franks, and a Catholic officer, Marquis de Lafayette, served directly under Washington, underscored his own commitment to ecumenicalism and helps explain his desire to avoid sectarian language that would divide his troops. *See* Hirschfeld, *George Washington and the Jews* 67-68 (2005); Koch, *A Popular History of the Catholic Church* 235-236 (1997). President Washington was equally determined not to permit religious differences to divide the new nation. Washington's public words and actions reveal that his objective was to communicate in a way that "unites—rather than divides—a religiously pluralistic people." Novak & Novak, *Washington's God: Religion, Liberty, and the Father of Our Country* 14 (2006).

b. President Adams

Washington's successor, Adams—who came from a State with an established church[5]—did not emulate Washington's religiously inclusive style, and he was repudiated for it during his failed reelection bid.

In his inaugural address, Adams told his listeners he had "a veneration for the religion of a people who profess and call themselves Christians, and a fixed resolution to consider a decent respect for Christianity among the best recommendations for the public service." Adams, *Inaugural Address* (Mar. 4 1797), in 1 *CMPP* 232. Adams's Thanksgiving proclamations were also "more overtly Christian than Washington's." Hitchcock, *The Supreme Court and Religion in American Life* 30 (2004). In the first of these, Adams used explicitly Christian language in his recommendation that all citizens "offer their devout addresses to the Father of Mercies . . . beseeching Him at the same time, of His infinite grace, through the Redeemer of the World, freely to remit all our offenses, and to incline us by His Holy Spirit." Adams, *A Proclamation* (Mar. 23, 1798), in 1 *CMPP* 269. The 1799 proclamation begins with a reference to the lessons of the "Volume of Inspiration" and calls for the citizens of the nation to "call to mind our numerous offenses against the Most High God, confess them before Him with the sincerest penitence, implore His pardoning mercy, through the Great Mediator and Redeemer, for our past transgressions, and that through the grace of His Holy Spirit we may be dis-

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[5] Indeed, Adams played a role in drafting the 1780 Massachusetts Constitution that authorized government support for Protestantism. *See* Meyerson, *supra*, at 77-78. As noted, the Framers understood that the First Amendment did not restrict state practices. *See supra* note 2.

posed and enabled to yield a more suitable obedience to His righteous requisitions in time to come." Adams, *Proclamation* (Mar. 6, 1799), in 1 *CMPP* 285.

During his reelection campaign against Jefferson, religion was a major issue. In the view of one Adams' supporter, "the approaching election ... is to decide a question not merely of preference to an eminent individual, or particular views of policy, but, what is infinitely more, of national regard or disregard to the religion of Jesus Christ." Mason, *The Voice of Warning to Christians* (1800), in 2 *Political Sermons of the American Founding Era* 1453 (Sandoz ed., 2d ed. 1998). Jefferson was presented by supporters of Adams as distinctly anti-Christian. As the Gazette of the United States famously framed the question: "Shall I continue in allegiance to GOD—AND A RELIGIOUS PRESIDENT; or impiously declare for JEFFERSON—AND NO GOD!!!" Waldman, *Founding Faith: Providence, Politics, and the Birth of Religious Freedom in America* 168 (2008). Jefferson's supporters responded that the election was a choice between "[a]n established church, a religious test, and an order of Priesthood" under Adams, and "[r]eligious liberty, the rights of conscience, no priesthood, truth and Jefferson." Duane, *Federalism vs. Republicanism* (Oct. 14, 1800), in *The Revolutionary Era: Primary Documents on Events from 1776 to 1800* 345 (Humphrey ed., 2003). In that way, "Jefferson's supporters used the Federalists' religious arguments to turn the election into a battle between those who wanted to return to the era of religious establishments," evidenced by Adams' proclamations, "versus those who supported religious freedom." Meyerson, *supra*, at 205.

Adams lost the election of 1800. Although many causes contributed to his defeat, Adam's vision of reli-

gion and government was one of them. Adams himself blamed his defeat on his religious proclamations: "The National Fast recommended by me turned me out of office." Letter from Adams to Rush (June 12, 1812), in *Old Family Letters* 392 (Biddle ed., 1892). As he explained, "[n]othing is more dreaded than the National Government meddling with Religion." *Id.* at 393. Adam's failure to follow Washington's inclusive religious style, in other words, was rejected by the People.

c. President Jefferson

For President Jefferson, the First Amendment's respect for religious liberty and principles of federalism forbid the national government from "intermeddling with religious institutions, their doctrines, discipline, or exercises." Letter from Jefferson to the Rev. Miller (Jan. 23, 1808), in 9 *WTJ* 174. "This results not only from the provision that no law shall be made respecting the establishment, or free exercise, of religion, but from that also which reserves to the states the powers not delegated to the U.S." *Id.*

Jefferson steadfastly opposed *official* government religious practice, as reflected in his refusal to issue Thanksgiving proclamations during his presidency. For Jefferson, even a *recommendation* of a day of Thanksgiving carried an implicit threat against religious outsiders. At minimum, he said, it would lead to "some degree of proscription perhaps in public opinion." Letter from Jefferson to the Rev. Miller (Jan. 23, 1808), *in* 9 *WTJ* 175. Because "Fasting & prayer are religious exercises" and "every religious society has a right to determine for itself the times for these exercises, & the objects proper for them," the right to call for days of fasting and prayer "can never be safer than in their own

hands, where the constitution has deposited it." *Id.* The government had no proper role in the process.[6]

When President Jefferson did use religious language in his public, though *unofficial*, speech it was limited, like Washington's, and cast in general and universal terms. In his first inaugural address, Jefferson expressed concern for protecting minority interests. He emphasized that it is a "sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate would be oppression." Jefferson, *First Inaugural Address* (Mar. 4, 1801), in 1 *CMPP* 322. He ended his inaugural address with a nondenominational religious plea similar in tone to that of Washington: "[M]ay that infinite power which rules the destinies of the universe lead our councils to what is best, and give them a favorable issue for your peace and prosperity." *Id.* at 324. Jefferson's speeches throughout his presidency continued this language of inclusion. *See* Meyerson, *supra*, at 208-209; *see, e.g.*, Jefferson, *Second Annual Message* (Dec. 15, 1802), in 1 *CMPP* 342 (referring to the "goodness of that Being from whose favor" "pleasing circumstances" flow); Jefferson, *Fifth Annual Message* (Dec. 3, 1805), in 1 *CMPP* 383 (referring to "Providence in His goodness").

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[6] Jefferson struck a similar chord in his letter to the Danbury Baptists, explaining that the First Amendment erected a "wall of separation between Church and State" and that "religion is a matter which lies solely between man and his God." Jefferson to Danbury Baptist Association (Jan. 1, 1802), in 5 *The Founders' Constitution*, *supra*, at 96.

d. President Madison

President Madison followed Washington and Jefferson in their approach to public religious speech. In his first inaugural address, Madison announced his guiding objective "to avoid the slightest interference with the rights of conscience, or the functions of religion so wisely exempted from civil jurisdiction." Madison, *First Inaugural Address* (Mar. 4, 1809), in 1 *The Papers of James Madison: Presidential Series [1809-1817]* 17 (Rutland et al. eds., 1984) [hereinafter *PJM*]. He ended his address with a religious statement reflecting general, nonsectarian language, acknowledging "the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future." *Id.* at 17-18.

Like Jefferson, Madison was opposed to official government religious proclamations, believing them to be unconstitutional. In his *Detatched Memoranda*, a collection of private papers written after he left office in 1817, Madison explained that religious proclamations "imply a religious agency, making no part of the trust delegated to political rulers." *Detatched Memoranda* 560-561. Calling these proclamations "advisory," he wrote, did not ameliorate the problem, since "an advisory Govt is a contradiction in terms." *Id.* at 560. Madison warned that these proclamations "nourish the erroneous idea of a national religion." Even were everyone of the same creed, Madison said, "reason and the principles of the Xn religion" require that any attempt to unite in an act of religion "ought to be effected thro' the intervention of their religious not of their political representatives." *Id.* at 560-561. In a country with

multiple religions, he warned, official proclamations had the tendency to "narrow the recommendation to the standard of the predominant sect." *Id.* at 561. If not carefully guarded against, this tendency "naturally terminates in a conformity to the creed of the majority and a single sect, if amounting to a majority." *Id.*

Despite his misgivings, and under enormous political pressure, Madison did issue four religious proclamations during the War of 1812, but he insisted the language be general and inclusive. *See* Meyerson, *supra*, at 222-223. Madison explained to a friend that he was "always careful to make the Proclamations absolutely indiscriminate, and merely recommendatory; or rather mere *designations* of a day, on which all who thought proper might *unite* in consecrating it to religious purposes, according to their own faith & forms." Letter from Madison to Livingston (July 10, 1822), in 9 *The Writings of James Madison* 101 (Hunt ed., 1910). For example, Madison opened his second proclamation by "recommending to all, who shall be piously disposed" to unite "in addressing at, one and the same, time their vows and adorations to the Great Parent and Sovereign of the Universe," who had blessed the United States with the "sacred rights of conscience." Madison, *Presidential Proclamation* (July 23, 1813), in 6 *PJM* 458-459.

B. The Framers' Religious Speech Undermines Petitioner's Historical Argument

The cautious and considered religious language used by leading Framers shows that they embraced a nuanced understanding of religious speech. "[G]overnment religious speech was to be permitted" but "strictly limited." Meyerson, *supra*, at 11. "The critically important aspect of the framing generation's compromise was that only the most general, nonsec-

tarian reference to God was deemed appropriate." *Id.* at 11-12. This points to a central flaw in the historical narrative set forth by Petitioner and its amici.

To be sure, the Framers accepted some forms of religious activity by government officials, including speech that could be described as "prayer." But to draw from that historical practice the lesson that the Framers accepted the government's use of *any* religious language in *any* circumstance would be a significant misreading of history. The context of religious speech, as well as its content, was critical to the Framers. For official speech directed to the public, they were exceptionally careful to ensure that any religious language would unite, not divide, the nation and for that reason they would have been highly skeptical of overtly sectarian prayer in that context. The Framers' wisdom was in recognizing the important but complicated relationship between religion and government, reflected in their ongoing efforts to "find a civil vocabulary that could encompass all people, regardless of their faith." Meyerson, *supra*, at 12.

II. The Framers Rejected Religious Coercion By The Government, Which They Defined Expansively, But Many Saw No Risk Of Coercion In The Unique Context Of Legislative Chaplains

In addition to uniting around the principle that government speech about religion should be circumscribed, unifying, and non-sectarian, the Framers agreed that no government religious expression should be coercive. This principle derived from a deeply held philosophical belief. For example, referring to his wartime instructions to respect the Catholic faith of many Canadians, Washington remarked that, "[w]hile we are contending for our own Liberty, we should be very cau-

tious of violating the Rights of Conscience in others, ever considering that God alone is the Judge of the Hearts of Men, and to him only in this Case, they are answerable." Boller Jr., *George Washington and Religion* 124 (1963). And in his letter to the Newport Jewish congregation, Washington wrote that "[a]ll possess alike liberty of conscience and immunities of citizenship," and therefore "the Government of the United States[] ... gives to bigotry no sanction." Washington to the Hebrew Congregation in Newport Rhode Island, (Aug. 18, 1790), in 6 *PGW: Presidential* 285.[7]

Although the Founders may have disagreed whether official government prayer proclamations were inherently coercive—as Jefferson's letter to Reverend Miller and Madison's *Detatched Memoranda* argued, *see supra* pp. 22-25—they agreed that the government should not coerce people to participate in religious worship or observance. They would have agreed with this Court's statement that "[t]he First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support

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[7] Madison expressed the same viewpoint. He wrote that all people had entered into society "on equal conditions" and were "to be considered as retaining an 'equal title to the free exercise of religion according to the dictates of conscience.'" Madison, *Memorial and Remonstrance* ¶ 4, in 5 *The Founders' Constitution*, *supra*, at 82; *see also* Madison, *Presidential Proclamation* (July 23, 1813), in 6 *PJM* 458-459 (American practice of limiting government involvement in religion proves that religion "freed from all coercive edicts, from that unhallowed connection with the powers of this world which corrupts religion into an instrument or an usurper of the policy of the state, and making no appeal but to reason, to the heart, and to the conscience, can spread its benign influence everywhere").

or influence the kinds of prayer the American people can say." *Engel* v. *Vitale*, 370 U.S. 421, 429 (1962).

Indeed, by the time of the passage of the First Amendment, concerns regarding establishment and rights of conscience included any government endorsement of religion that might exclude members of the community based on their religious beliefs or that could pressure individuals to conform to the religion of the majority. For Jefferson and Madison, of course, this exclusion could occur any time the government made official religious proclamations, as such speech inherently involved "some degree of proscription." Letter from Jefferson to the Rev. Miller (Jan. 23, 1808), in 9 *WTJ* 175; *see Detatched Memoranda* 560-561 (religious proclamations "naturally terminate[] in a conformity to the creed of the majority and a single sect, if amounting to a majority"). As described above, other Framers, including Washington most prominently, demonstrated by their unwavering practice that they saw official sectarian proclamations aimed at the public as contradicting the American understanding of freedom of religion. And the formative debates regarding the roles of government and religion in the 1770s and 1780s show how expansive the concepts of "establishment" and religious "coercion"—understood here as any government infringement on an individual's rights of conscience—had become.

This history directly responds to Petitioner's cramped contention that the Establishment Clause was concerned only with forced subsidization of a "favored religion" or "compell[ed] obedience to the tenets of a particular faith." Pet. Br. 36. It is also relevant for a second, less obvious, reason. The Framers understood that whether particular government conduct amounted to prohibited coercion depended entirely on context.

That contextual understanding explains why many Framers viewed legislative chaplains for Congress as acceptable, but also why they would have viewed government-sponsored sectarian prayer directed at the public as an affront to "freedom of belief and conscience." *Lee*, 505 U.S. at 592.

A. At The Founding, The Related Concepts Of "Establishment" And Religious "Coercion" Were Broad And Still Expanding

The First Amendment prohibits any "law respecting an establishment of religion." U.S. Const. amend. I. What constitutes an "establishment" is hardly self-evident. In the worst cases of establishment, the government had endorsed a particular official religion and required everyone to adhere to it, support it with taxes, and participate in its worship. *See* Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 25 (1986) [hereinafter Curry, *First Freedoms*]. Opposition to this type of establishment was an easy case for the Framers, but it far from exhausted their concern. By the time the Establishment Clause was adopted, the Framers' concern with coercion was far more expansive: even measures that, on their face, appeared to avoid restraints on individual liberty were rejected as establishments or violative of rights of conscience.

On this point, the lead up to and passage of the Virginia Act for Establishing Religious Freedom, a precursor to the federal Establishment Clause, is particularly informative. In 1784, Patrick Henry proposed a bill to the Virginia legislature for "establishing a provision for teachers of the Christian religion" and requiring religious teachers be paid by the state. Under the bill, individual taxpayers could designate the particular "society

of Christians" to which they wished to have their money allocated—that is, the state did not itself choose a sect to support. (The bill is printed in *Everson*, 330 U.S. at 72-74.) Taxpayers were also free not to choose a particular sect at all, in which case their taxes would be distributed for the encouragement of seminaries of learning," or schools. *Id.* at 74. The assessment thus attempted to minimize both the government's involvement in religion and the specter of adherents of minority religions being forced to contribute to the religious worship of others. In those ways, it addressed the traditional forms of government "coercion" that had plagued earlier establishments. *See* Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 Val. U. L. Rev. 37, 47 (1991).

Nevertheless, leading Founders, as well as religious dissenters, decried the bill, framing their objections in terms of both establishment and individual right of conscience. Madison's *Memorial and Remonstrance*—written in opposition to Henry's bill—termed the general assessment "a dangerous abuse of power" and an "establishment." Madison, *Memorial and Remonstrance* at Preamble ¶¶ 6, 8, in 5 *The Founders' Constitution*, *supra*, at 82-83. Asserting that it was "an unalienable right" of individuals to exercise their religion solely as their own "conviction and conscience" may dictate, Madison warned that religious establishments violate fundamental republican principles by permitting "Rulers who wished to subvert the public liberty" to utilize the "established Clergy [as] convenient auxiliaries." *Id.* ¶ 1, 8. Madison further condemned treating the "Civil Magistrate" as a "competent Judge of Religious Truth" and "employ[ing] Religion as an engine of Civil policy." *Id.* ¶ 5. Combining theories of religious obligation with personal autonomy,

Madison stated that "[i]t is the duty of every man to render to the Creator such homage ... only as he believes to be acceptable to him." *Id.* ¶ 1. The bill, though nondiscriminatory on its face, "degrade[d] from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." *Id.* ¶ 9. Jefferson, as well, strongly opposed Henry's bill on the same grounds. *See, e.g.*, Ragosta, *Religious Freedom* 33.

Washington also opposed Henry's bill on the ground that such support for religion was politically divisive. Washington did not object in principle to an assessment, so long as it scrupulously protected minority religions through appropriate exemptions. *See* Letter from Washington to Mason (Oct. 3, 1785), in 3 *The Papers of George Washington: Confederation Series* 292-293 (Abbot et al. eds., 1992-1997). He wrote, however, that he was opposed to the bill, explaining that it would "rankle, & perhaps convulse the State." *Id.*

Religious groups criticized Henry's bill because it would debase Christianity and violate individual rights of conscience. Virginia Presbyterians, for example, explained the religious grounds for their opposition: "We are fully persuaded of the happy influences of Christianity upon the morals of men; but we have never known it, in the history of its progress, so effectual for this purpose, as when left to its native excellence and evidence to recommend it, under the all-directing providence of God, and free from the intrusive hand of the civil magistrate. Its Divine Author did not think it necessary to render it dependent on earthly governments." *Memorial of Convention at Bethel* (Aug. 1785), in *Documentary History of the Struggle for Religious Liberty in Virginia* 237 (James ed., 1900). They warned that the assessment harmed those who did not share the majori-

ty's religious beliefs, stating that it "unjustly subjects men who may be good citizens, but who have not embraced our common faith, to the hardship of supporting a system they have not as yet believed the truth of." *Id.* at 238. Virginia Baptists similarly decried the bill because they opposed any link between government and religion. *See Prince George County Petition* (Nov. 28, 1785), in Curry, *Farewell to Christendom: The Future of Church and State in America* 123-124 (2001).

Instead of the much criticized assessment, Madison successfully guided the Virginia Act for Establishing Religious Freedom that Jefferson had written through the Virginia legislature. 5 *The Founders' Constitution*, *supra*, at 84. That statute declared "that all attempts to influence [the mind] by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion." *Id.* The statute stated "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Id.* What is more, and crucially, the statute reflected opposition to the "impious presumption of legislators and rulers" who declare their own religious opinions as correct, as well as any action by government that effectively conditions the full "privileges and advantages" of citizenship on an individual "profess[ing] or renounc[ing] this or that religious opinion." *Id.* The statute accordingly announced that "all men shall be free to profess ... their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities." *Id.* at 85.

The spirited debate over the Virginia assessment bill and the eventual enactment of Jefferson's competing bill demonstrate how broadly the founding genera-

tion conceived of establishment and coercion in the years preceding enactment of the Establishment Clause. Indeed, even supporters of the bill never doubted that it effected an establishment of religion. *See* Curry, *First Freedoms* 146-148. The debate is equally important because it demonstrates that the Framers rejected, as an affront to individual rights of conscience, measures far less intrusive than compelled obedience to particular state-sanctioned religious faith.

B. For Many Framers, Legislative Chaplains Did Not Offend Individual Conscience Or Effect An Establishment, But That Is Of Limited Relevance In This Case

The founding-era understanding of coercion casts important light on the Framers' understanding of legislative chaplains and legislative prayer. Although the view was not universal, many Founders deemed legislative chaplains unobjectionable, as this Court recognized in *Marsh*. *See* 463 U.S. at 788-790. But that is because the Framers embraced a contextual understanding of coercion that took account of the setting and purpose of government religious speech, and ministering to members of Congress simply did not present a risk of coercion that warranted condemnation.

The Framers would have understood that legislative chaplains were ministering to legislators themselves, much like military chaplains might serve the spiritual needs of those in the army. This ministering was not only *not directed* at the public, but it typically would not have been *observed* by the public.[8] The risk

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[8] The Senate was closed to public viewing at the time Congress first hired chaplains, and the House was viewable from the gallery only. *See* Parry, *Legislatures and Secrecy*, 67 Harv. L. Rev. 737, 743 (1954).

of public coercion from legislative prayer thus was virtually non-existent. Even in this limited setting, the practice was not free of controversy. But the key point is that the Framers would have recognized the basic difference between, on the one hand, a chaplain ministering to members of Congress and, on the other, government-sponsored prayer intended for public consumption, especially when the audience for prayer is captive. Indeed, the United States in its brief acknowledges the importance of such contextual factors in evaluating religious speech, including, for example, whether a government body is engaged in providing direct benefits to citizens when it sponsors prayer and whether those who wish to do business with the body may enter and leave freely to avoid the prayer without consequence. *See* U.S. Br. 22-24.

Madison recognized the distinction between ministering to legislators and to the public in his *Detatched Memoranda*, though he ultimately condemned the use of legislative chaplains. Madison argued that chaplains were inconsistent with the "pure principle of religious freedom" and that the practice was tantamount to a "national establishment." *Detatched Memoranda* 558. At the same time, Madison acknowledged that, strictly speaking, the appointment of chaplains for Congress enabled "religious worship for the national representatives." *Id.* In that way, legislative chaplains resembled chaplains in the army and navy, which existed to minister to the spiritual needs of the armed forces, and which Madison viewed as a closer constitutional question. *See id.* at 559-560; *see also* H.R. Rep. No. 33-124, at 6-7 (1854) (noting that legislative chaplains were needed to serve the spiritual needs of Congress); Becket Fund Amicus Br. 23 ("employment of a legislative chaplain is different in kind from government funding of ministers

or religious teachers for the general public" because a chaplain "serves the unique needs of legislators" and not the "general public").

Perhaps the most important proof that the Framers' diffident acceptance of legislative chaplains was not a wholesale endorsement of government-sponsored religious worship comes from the scarcity of historical evidence of such practices outside that unique setting. To be sure, certain federal courts for a time may have followed practices common to the States in which they sat, practices which sometimes might include opening a session with sectarian prayer. *See* Letter from Jay to Law (Mar. 10, 1790), in 2 *The Documentary History of the Supreme Court of the United States, 1789-1800*, at 13 (Marcus et al. eds., 1988) [hereinafter *Documentary History*]; Columbian Centinel (Oct. 17, 1792), in 2 *Documentary History* 317 ("[T]he *Circuit Court* of the *United States* opened in this town. After the Rev. Dr. Lathrop had addressed the throne of Grace, in prayer, ... the business of the session commenced." (internal footnote omitted)). But John Marshall effectively rejected that approach, selecting an invocation for the Supreme Court ("God save the United States and this honorable Court") that, much like the religious speech of the early Presidents, is self-evidently universal and noticeably avoids any sectarian reference. 1 Warren, *The Supreme Court in United States History* 469 (1922). This historical example is thus further evidence of a founding generation that was continually evolving toward a more national and more inclusive religious vocabulary.

In sum, although the First Congress authorized legislative chaplains, that practice is of extremely limited value in discerning the original understanding of the Establishment Clause as relevant here. Because

legislative chaplains were hired principally to minister to the needs of legislators and because legislative prayers were not directed at the public, many Framers would not have seen the practice as posing any risk of coercion or diminution in the right of full participation in public discourse. The practice thus says nothing about application of the Establishment Clause in circumstances where, as here, the government is directing sectarian religious speech at the public in a setting in which citizens are directly engaging with a governmental body, and in which citizens face substantial pressure to participate in sectarian worship in order to do business with the governmental body.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a legislative-prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law[1] (the Foundation) is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the unalienable right to acknowledge God, especially when exercised by public officials. The Foundation encourages the judiciary and other branches of government to return to the historic and original interpretation of the United States Constitution and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has assisted in several cases concerning the public display of the Ten Commandments, the recitation of the Pledge of Allegiance, and other public acknowledgements of God. The Foundation has filed several amicus briefs in federal circuit courts around the country defending the constitutionality of public prayer in legislative bodies.

The Foundation has an interest in this case because it believes that prayer by or for legislative and other policy-making bodies constitutes one of the many public acknowledgements of God that have been

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[1] Pursuant to this Court's rule 37.3, all parties have consented to the filing of this amicus brief. Further, pursuant to Rule 37.6, this amici curiae states that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

espoused from the very beginning of the United States as a nation without violating the United States Constitution. The Foundation believes that the government should encourage such acknowledgments of God because He is the sovereign source of American law, liberty, and government. This brief primarily focuses on whether the Court should determine the constitutionality of legislative prayers based on the nonsectarian nature of the prayers and whether the Town of Greece's practices in choosing someone to lead prayer was a violation of the Establishment Clause.

SUMMARY OF ARGUMENT

When courts and local officials attempt to distinguish between sectarian and nonsectarian prayers and censor out the former, they embark upon a slippery slope of entanglement with religion, prefer some religions over others, and engage in theological exercises in which they have neither expertise nor jurisdiction. Demanding that the government allow only nonsectarian legislative prayers also risks the establishment of a "civic religion," which the Supreme Court has expressly forbidden. Accordingly, the Court should refuse to determine the constitutionality of legislative prayers on the basis of whether or not they are nonsectarian. The Court should take into consideration the fact that legislative prayer and other acknowledgements of God by the branches of our government are deeply embedded in American history and traditions.

Furthermore, that the prayers offered at the Town of Greece's board meetings were predominantly Christian does not mean that the Town must alter its prayer-giver selection process by soliciting volunteers outside town borders. Asking the town for such

"affirmative action" exceeds the requirements of the Establishment Clause. The Town of Greece did not spitefully exclude members of other religions from giving prayer. On the contrary, the Town accepted volunteers from all faiths. That the majority of the prayers given at this town's board meetings were Christian prayers simply reflects the religious makeup of the town of Greece, which would no doubt differ in other cities.

Greece's Town Board meeting prayers seek God's favor and express an American view of law and government. As such, these prayers are not an establishment of religion. They are merely a demonstration of the philosophy upon which our nation was founded.

ARGUMENT

I. DISTINGUISHING "SECTARIAN" FROM "NON-SECTARIAN" PRAYERS FAVORS SOME RELIGIONS OVER OTHERS AND LEADS TO A JUDICIAL QUAGMIRE WHICH THE COURT HAS NEITHER JURISDICTION NOR EXPERTISE TO NAVIGATE.

Some circuits have chosen to determine the constitutionality of legislative prayers based on whether or not the prayers are sectarian. *See, e.g., Joyner v. Forsyth County, North Carolina*, 653 F.3d 341, 347 (4th Cir. 2011), *Hinrichs v. Bosma*, 440 F.3d 393, 399 (7th Cir. 2006). The Second Circuit correctly chose to avoid ruling on the basis of this distinction. However, Amicus will address this issue because Galloway has raised this issue at the district and circuit court levels, and the issue may be raised at the Supreme Court level as well.

A ruling that permits nonsectarian prayer but prohibits sectarian prayer puts judges and other government officials in the difficult position of defining "sectarian" and, even more difficult, drawing a line between sectarian and nonsectarian. James Madison, a primary author of the First Amendment, recognized this danger in 1784 when he spoke against religious assessments, a proposal in the Virginia House of Burgesses to impose a tax, the proceeds of which were for the support of "Christian" clergy. Madison's notes from one of his speeches on the religious assessments bill were as follows:

> 3. What is [Christianity]? Courts of law to Judge. ...
>
> 7. What sense the true one for if some doctrines be essential to [Christianity] those who reject these, whatever name they take are no [Christian] society?
>
> 8. Is it Trinitarianism, Arianism[2], Socinianism[3]? Is it salvation by faith or works also, by free grace or by will, &c, &c.
>
> 9. What clue is to guide Judge thro' this labyrinth when ye question comes before them whether any particular society is a [Christian] society?

James Madison, 1784, reprinted by Norman Cousins, *In God We Trust*, 302-04 (Harper and Brothers 1958). Madison's point was that if the State of Virginia was going to give the proceeds of this assessment to "Christian clergy," then the State of Virginia would

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[2] An heretical doctrine that Christ was divine but not equal to the Father.

[3] Similar to Unitarianism.

have to define who is and who is not a Christian. If a Roman Catholic priest asked for his share of the subsidy, should he receive it? Some Protestants in Madison's time would have denied that Roman Catholics are Christians. Would an Arian or a Socinian be defined as a Christian for subsidy purposes? What about a person who believes salvation is by works rather than by faith? Judges and state officials have neither the jurisdiction, nor in many instances, the competence to determine who is and who is not a Christian.

Thomas v. Review Board of Indiana Employment Sec. Division, 405 U.S. 707, 714-16 (1981), involved a Jehovah's Witness who worked in a steel foundry and who was fired because he refused to build tank turrets. He was denied unemployment compensation because, his employer said, he was fired for misconduct, i.e., refusing to do the work he was ordered to do. Thomas claimed a free exercise violation, contending that work on tank turrets violated his pacifist religious convictions as a Jehovah's Witness. The lower court held that his objections to working on tank turrets were personal and philosophical, not religious, because (1) Jehovah's Witness doctrine forbade serving in the military and participating in war but said nothing about working on tank turrets; (2) a fellow Jehovah's Witness testified that he worked on tank turrets for the same foundry, saw no conflict between that work and his Jehovah's Witness religious beliefs, and had not been admonished or disciplined by the Jehovah's Witnesses for doing so; and (3) Thomas said he did not object to working in other parts of the foundry refining steel that would ultimately be used for tank turrets. However, the Supreme Court reversed and ruled for Thomas, saying at 715-16:

In reaching its conclusion, the Indiana court seems to have placed considerable reliance on the facts that Thomas was "struggling" with his beliefs, and that he was not able to "articulate" his belief precisely. It noted, for example, that Thomas admitted before the referee that he would not object to

> working for United States Steel or Inland Steel . . . produc[ing] the raw product necessary for the production of any kind of tank . . . [because I] would not be a direct party to whoever they shipped it to [and] would not be . . . chargeable in . . . conscience. . . .

271 Ind. at ___, 391 N.E.2d at 1131. The court found this position inconsistent with Thomas' stated opposition to participation in the production of armaments. But Thomas' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.

The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a

> particular creed, and the judicial process is singularly ill-equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. *Courts are not arbiters of scriptural interpretation.* [Emphasis added]

Determining whether a prayer is sectarian or nonsectarian requires councilmen, commissioners, judges, legislators, and other public officials to become "arbiters of scriptural interpretation," church doctrine, and other matters that are beyond their jurisdiction and often beyond their competence.

First, they must define "sectarian." A "sect" is defined as "a subdivision within a larger religious group." *The American Heritage Dictionary of the English Language* (Houghton Mifflin 1969, 1976) defines "sect" as "a group of people forming a distinct unit within a larger group by virtue of certain refinements or distinctions of belief or practice" and "sectarian" as "pertaining to or characteristic of a sect or sects." *Black's Law Dictionary, 7th Ed.* (West 1999) defines "sectarian" as "of or relating to a particular religious sect."

Using these definitions, Christianity, Judaism, Islam, Buddhism, and others are religions, not sects. Sects within Christianity would include Roman Catholicism, Lutheranism, Methodism, Presbyterianism, etc; sects within Judaism might include Reformed, Conservative, and Orthodox; sects within Islam might include Sunni and Shiite; sects within Buddhism might include Zen, Mahayana, and others.

Under this definition of sect, using the name of Jesus Christ in a prayer would not be "sectarian." Using the Anglican *Book of Common Prayer*, the Augsburg Confession of Lutheranism, the Catechism of the Roman Catholic Church, or other such documents might be sectarian. But if a policy singles out Christianity and prohibits prayer in the name of Jesus but does not prohibit prayer in the name of the God of Abraham, Isaac, and Jacob, that policy discriminates against the Christian religion.

Once a court or other government official has defined sectarian, he/she must then determine whether a particular prayer has crossed that fine and gray-clouded line and has become sectarian. If we decide that all prayer "in the name of our Lord and Savior Jesus Christ" is sectarian, then would a prayer that merely mentions "Jesus" also be sectarian? Many religions outside the pale of Christianity respect Jesus as a teacher and as a person. Would a prayer in the name of "the Messiah of Israel" be considered sectarian? What about a prayer that contains phraseology from the Old or New Testament? Would a prayer be sectarian if it does not mention Jesus Christ but incorporates elements of Christian theology like the grace of God, intercession, forgiveness for sin, providence in history, miraculous power, or answers to prayer? Neither public officials, such as Town Board

members, nor judges have the jurisdiction or competence to "parse" these prayers. Leading theologians, even theologians of the same religion or denomination, might disagree as to where to draw this line. Furthermore, if judges immerse themselves in distinguishing sectarian from nonsectarian prayers, they risk fostering the excessive entanglement of government with religion that, according to *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the Establishment Clause was intended to avoid.

Those who pray in the name of Jesus Christ generally do not do so to proselytize; they do so out of obedience to God and His commands as they understand them. Jesus said:

> Verily, verily, I say to you, Whatever ye shall ask the Father in my name, he will give it to you. Hitherto ye have asked nothing in my name: ask, and ye shall receive, that your joy may be full. (*John* 16:23-24 (KJV)).

Many have interpreted this and other passages as commands to pray in the name of Jesus. The *Catechism of the Catholic Church* 702 (Doubleday Edition 1995) provides, "there is no other way of Christian prayer than Christ. Whether our prayer is communal or personal, vocal or interior, it has access to the Father only if we pray 'in the name' of Jesus." Lutheran scholar Francis Pieper, whose four volume systematic theology text *Christian Dogmatics* (Concordia Publishing House 1953, 1970) has been used in seminaries to train thousands of Lutheran pastors, states, "[P]rayer presupposes justifying faith. Only faith in the forgiveness of sins for Christ's sake makes prayer a prayer 'in the name of Christ,' and only prayer in the name of Christ has God's command and promise (John 16:23; 14:13-14)." Pieper, 3

Christian Dogmatics at 80. Writing from a Calvinist Presbyterian perspective, Robert L. Dabney in his *Systematic Theology* 713 (Banner of Truth 1871, 1995), writes that praying in the name of Jesus is part of the very definition of prayer: "Prayer is an offering up of our desires unto God for things agreeable to His will, *in the name of Christ*, with confession of our sins, and thankful acknowledgment of his mercies." (Emphasis added). Many more statements from various Christian traditions and denominations could be similarly cited. Taken together, they represent a large portion of Christianity.

While other Christians may hold a different view and believe it is permissible to lead in prayer without mentioning Jesus Christ, the previous examples demonstrate that large numbers of Christians believe, based on the Bible and the teachings of their respective denominations, that all prayer must be in the name of Jesus. A clergyman or other person who holds this belief would violate his own conscience, what he or she perceives to be the command of God, and the doctrine of his or her church, if he or she were to pray without using the name of Jesus Christ. Inviting a member of the clergy to pray before a Town Board meeting but telling that person that he or she may not pray in the name of Christ, forces that clergyperson to either (1) decline the invitation to pray, or (2) disobey the perceived command of God and of his or her religious faith. Generally, the Court has not allowed the government to force individuals to sacrifice their religious convictions in this way.

For example, *Sherbert v. Verner*, 374 U.S. 398 (1963), involved a Seventh Day Adventist who was fired from her job because, in obedience to her religious convictions, she could not work on Saturdays. The

State of Indiana denied her claim for unemployment compensation, claiming that she had been fired for misconduct, i.e., refusing an order to work on Saturdays. But this Court reversed, holding that

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.
>
> Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right," but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

Id. at 404. Citing *Speiser v. Randall*, 357 U. S. 513, *Sherbert* further noted that "conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, a to inhibit or deter the exercise of First Amendment freedoms," *Id.* at 405, and that "the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression, and thereby threatened to 'produce a result which the State could not command directly.'" *Id.* at 405.

Likewise, in *McDaniel v. Paty*, 435 U.S. 618, 626 (1978), this Court invalidated a provision of the

Tennessee Constitution which prohibited clergymen from holding public office, because "it conditions his right to the free exercise of his religion on the surrender of his right to seek office." As the Court further stated at 641, "The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here; *Abington School Dist. v. Schempp*, 374 U. S. 203, 222 (1963). It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life."

The case at hand is similar. Some might argue that no one has a "right" to pray at a town board meeting. However, if the town board calls upon religious leaders to pray at board meetings, it cannot arbitrarily refuse to consider a religious leader for selection to pray solely because that person's religious convictions compel him or her to pray in the Name of Jesus Christ, just as holding public office is not a constitutional right but the State of Tennessee may not arbitrarily prohibit a person from running for public office solely because that person exercises his/her free exercise right to serve as a clergyperson.

Some claim that praying in the name of Jesus sends a message of exclusion to those who do not believe in Christ, telling them that they are not fully part of the community. In the same way, forbidding a person from leading in prayer because that person believes prayer must be in the Name of Jesus sends a similar message of exclusion to that person, telling him or her that he or she is not fully part of the community. To prevent a message of exclusion to anyone, the Town Board has chosen the side of religious freedom in prayer, allowing prayer givers to volunteer and pray as they

are led. The Constitution does not give judges the authority or the capacity to veto or alter that decision.

Additionally, the Second Circuit is correct in asserting that *Marsh v. Chambers*, 463 U.S. 783 (1983), does not require legislative prayers to be nonsectarian. In fact, *Marsh* upheld the constitutionality of a legislative prayer practice that was in many ways more narrowly "sectarian" than the prayers in the town of Greece. In *Marsh*, the same Presbyterian minister, paid by the taxpayers, opened the Nebraska legislature sessions with prayer for sixteen years.[4] In contrast, different pastors were invited or permitted to pray at the town of Greece's board meetings, and they received no compensation for doing so. The town accepted volunteers from all denominations and never rejected a request to lead prayer. Some cases seem to accept *Marsh*'s ruling on the grounds that the minister removed all references to Christ after a legislator complained. *See Allegheny County v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989). Even the Second Circuit agrees, however, that this does not mean that "any *single* denominational prayer has the forbidden effect of affiliating the government with any one faith." *Galloway v. Greece*, 681 F.3d 20, 29 (2nd Cir. 2012), emphasis original.

The Supreme Court has held the Establishment Clause to mean that the government can have no

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[4] We should add that Chaplain Palmer did not always pray in the Name of Jesus Christ and that at times he invited other religious leaders to lead the prayers. Nevertheless, it was recognized by all that Chaplain Palmer was the official chaplain of the Legislature, that he was a professing adherent of the Christian religion and of the Presbyterian sect/denomination, and that his predecessor was also a Presbyterian clergyman.

official preference, even for religion over non-religion. *Allegheny County*, 492 U.S. at 605. At the same time, the Court should not license the government to prefer non-religion over religion by requiring legislative prayers to adhere to a nebulous definition of "non-sectarian." For the Court to ask the government to show "callous indifference" toward religious groups is the equivalent of a governmental preference for no religion over religion. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). The Court has also interpreted the establishment clause to mean that the government cannot prefer one sect or creed over another. *Allegheny County*, 492 U.S. at 605. For the Court to mandate that legislative prayers must be nonsectarian is a preference in itself—it is a preference for nonsectarian prayers over those that are sectarian. When a school principal advised a rabbi that his prayer before the school must be nonsectarian, the Court interpreted this as the government attempting to compose an official prayer and reiterated that the prohibition of government from doing this is a "cornerstone of our Establishment Clause jurisprudence." *Lee v. Weisman*, 505 U.S. 577, 588 (1992). And in *Engel v. Vitale*, 370 U.S. 421 (1962) at 430, striking down the use of a 22-word nonsectarian prayer ("Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us our parents, our teachers and our Country"), this Court stated that government "is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity."

As the Second Circuit recognized, deciding the constitutionality of legislative prayers based on whether they are sectarian or nonsectarian risks the establishment of a "civic religion." *Greece*, 681 F.3d at 28-29. The Supreme Court has explicitly rejected the

idea that the government "may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds." *Lee*, 505 U.S. at 590. Nor may the State establish a "religion of secularism" by affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe." *School Disrict of Abington v. Schempp*, 374 U.S. 203, 225 (1963), citing *Zorach*, 343 U.S. at 314. The Supreme Court has also recognized that a doctrine need not teach a belief in the existence of God to be considered a religion:

> Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.

Torcaso v. Watkins, 367 U.S. 488, n.11 (1961), citing *Washington Ethical Society v. District of Columbia*, 249 F.2d 127 (1957). Thus, simply because a prayer does not mention God does not exempt it from being a religious prayer. The confusion that a distinction between sectarian and nonsectarian prayers would cause is simply not navigable for anyone, and the Court should not use it as a basis for deciding the constitutionality of legislative prayers.

Ironically, the middle school graduation prayer in *Lee v. Weisman* was declared unconstitutional precisely because the school tried to make the graduation prayer nonsectarian. Rabbi Leslie Gutterman had been invited to give the invocation at the graduation. In keeping with the policy of past graduations, school principal Robert E. Lee gave Rabbi Gutterman a pamphlet entitled "Guidelines for Civic Occasions," prepared by the National Conference of Christians

and Jews. As the Court said, "The principal gave Rabbi Gutterman the pamphlet before the graduation and advised him the invocation and benediction should be nonsectarian." *Lee*, 505 U.S. at 581. The Court went on to say:

> The State's role did not end with the decision to include a prayer and with the choice of a clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions," and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayers. Even if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation and effectiveness in the community would incur the State's displeasure in this regard. It is a cornerstone principle of our Establishment Clause jurisprudence that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government," *Engel* v. *Vitale*, 370 U. S. 421, 425 (1962), and that is what the school officials attempted to do.
>
> Petitioners argue, and we find nothing in the case to refute it, that the directions for the content of the prayers were a good-faith attempt by the school to ensure that the sectarianism which is so often the flashpoint for religious animosity be removed from the graduation ceremony. The concern is understandable, as a prayer which uses ideas or

> images identified with a particular religion may foster a different sort of sectarian rivalry than an invocation or benediction in terms more neutral. The school's explanation, however, does not resolve the dilemma caused by its participation. The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend.

The dilemma is apparent: If the State allows sectarian prayers, the courts will hold that to be a government establishment of religion. If the State directs nonsectarian prayers, the courts will hold that to be a government attempt to dictate the content of prayers. And yet, as this Court has made clear and as the Second Circuit acknowledges, prayer is not forbidden. The best solution is for officials to devise a fair and inclusive means of selecting people to give prayers and to leave the content of the prayers to those who give them – precisely what the Town of Greece has done here.

II. AMERICAN HISTORY DEMONSTRATES THAT PRAYER BY PUBLIC FIGURES IN PUBLIC SETTINGS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

As this Court recognized in *Marsh*, 463 U.S. at 786,

> The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since,

> the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.

The Court further noted at 787 that the Continental Congress had paid chaplains to lead in prayer and that the each House of the First Congress of 1789 – the same Congress that adopted the First Amendment – adopted a policy of selecting a chaplain to open each session with prayer.

The Second Circuit found it both "relevant" and "worthy of weight" that those who prayed before Greece's town board meetings "appeared to speak on behalf of the town and its residents . . . " *Greece*, 681 F.3d at 32. While the Second Circuit considered these facts as further contextual support that the town acted unconstitutionally, "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). This Court itself has acknowledged the role of religion in our society. *See e.g.*, *Schempp*, 374 U.S. at 212 ("Religion is closely identified with our history and our government."); *Zorach*, 343 U.S. at 313 ("We are a religious people whose institutions presuppose a Supreme Being."). Even the Court's previous case involving legislative prayer held, "To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment'

of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792.

Invocation of the Almighty by our public figures, at all levels of government, remains commonplace. *McCreary County, Kentucky. v. ACLU of Kentucky.*, 545 U.S. 844, 888-89 (2005) (Scalia, J., dissenting). The executive has acknowledged God officially with the words "so help me God" in the Presidential oath, words that George Washington himself added. *Id.* at 886 (Scalia, J., dissenting), citing Blomquist, The Presidential Oath, the American National Interest and a Call for Presiprudence, 73 UMKC L.Rev. 1, 34 (2004). In addition to the Presidential oath, presidents have specifically invoked help and guidance for the country through prayer. George Washington opened his presidency with prayer. *McCreary County*, 545 U.S. at 887 (Scalia, J., dissenting), citing *Inaugural Addresses of Presidents of the United States*, 1-2, 1989. On October 3, 1789 during the National Day of Thanksgiving Proclamation, George Washington addressed the nation saying, "It is the duty of all nations to acknowledge the providence of the Almighty God." After opening his presidency with prayer, President Washington ended his presidency by reminding his fellow citizens that "reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle." *McCreary County*, 545 U.S. at 887 (Scalia, J., dissenting), citing Farewell Address (1796), reprinted in 35 *Writings of George Washington* 229 (J. Fitzpatrick ed.1940).

Numerous other Presidents have officially acknowledged God through prayer or official addresses to the

people of the nation. In President Lincoln's Proclamation Appointing a National Fast Day, he stated, "It is the duty of nations as well as of men, to own their dependence upon the overruling power of God..." (March 30, 1863). Additionally, Thomas Jefferson concluded his second inaugural address not only by praying, but also by inviting the audience to pray. *McCreary County*, 545 U.S at 888 (Scalia, J., dissenting), citing *Inaugural Addresses of the Presidents of the United States*, at 18, 22–23. James Madison also prayed at his first inaugural address. *McCreary County*, 545 at 888 (Scalia, J., dissenting), citing Inaugural Addresses of the Presidents of the United States, at 25, 28. Franklin Roosevelt suggested "a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas" so that "we may bear more earnest witness to our gratitude to Almighty God." *Allegheny County*, 492 U.S. at 671 (Kennedy, J., dissenting), citing Presidential Proclamation No. 2629, 58 Stat. 1160.

Like both the Executive and Judicial branches, the Legislative branch has a history of acknowledging the role of prayer in our government. In fact, the First Congress began the practice of opening legislative sessions with prayer. *McCreary County*, 545 U.S. at 886 (Scalia, J., dissenting), citing *Marsh*, 463 U.S. at 787-88. Seventeen members of that First Congress were Delegates to the Constitutional Convention, where freedom of religion and antagonism toward an established church were frequently discussed. *Lynch*, 465 U.S. at 674, citing *Marsh*, 463 U.S. 783.

The very week that Congress submitted the Bill of Rights for the States to ratify, including the Establishment Clause, it enacted legislation providing for paid chaplains. *McCreary County*, 545 U.S. at 886

(Scalia, J., dissenting), citing *Marsh*, 463 U.S. at 788. In examining the constitutionality of the congressional chaplaincy in 1863, a Senate Judiciary Committee Report stated, "Our Fathers did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators." Additionally, the day after First Amendment was proposed, Congress requested the President to proclaim "a day of thanksgiving and prayer to be observed by acknowledging, with grateful hearts, the many and signal favors of Almighty God. *McCreary County*, 545 U.S. at 886 (Scalia, J., dissenting), citing H.R. Jour. 1st Cong. 1st Sess. 123 (1826 ed). Sen. Jour. 1st Sess. 88 (1820 ed.). That the very men who penned the Establishment Clause approved and practiced legislative prayer proves that legislative prayer is not a constitutional violation.

Continuing the traditions of the First Congress, Congress today recognizes the importance of legislative prayer. Congress still employs a legislative chaplain. 2 U.S.C. § 61d. In addition to providing a legislative chaplain, there is also a special prayer room for members of the House and Senate. *Allegheny County*, 492 U.S. at 672 (Kennedy, J., dissenting). Choosing not to stop there, Congress has directed the President to proclaim a National Day of Prayer each year "on which [day] the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." *Id.*

III. THE ESTABLISHMENT CLAUSE DOES NOT REQUIRE THE TOWN OF GREECE TO LOOK BEYOND ITS BOUNDARIES TO FIND RELIGIOUS LEADERS TO LEAD IN PRAYER.

The Second Circuit found that the prayer policy of the Town of Greece, considering the totality of circumstances, must be viewed as the endorsement of the Christian religion. They reached this conclusion largely because the Town selected religious leaders to pray "almost exclusively from places of worship located within the town's borders." *Greece*, 681 F.3d at 31. The Court continued, "The town failed to recognize that its residents may hold religious beliefs that are not represented by a place of worship within the town. Such residents may be members of congregations in nearby towns or, indeed, may not be affiliated with any congregation." *Id.*

The very use of the word "may" three times in these two sentences demonstrates the conjectural nature of the Court's concern. The Court cites no evidence, on or off the record, that any town residents did not find their beliefs represented by religious establishments within the town, that any were associated with religious organizations elsewhere, or that any of them had ever expressed any concern that the prayers offered at the Town Board meetings did not represent them, other than Galloway or Stephens. Amicus respectfully submits that the question of going beyond the town's borders is not at issue in this case and should not be considered unless and until a plaintiff presents evidence that some town residents worship at religions establishment outside the town borders and contend that those who are chosen to pray do not represent them.

The Second Circuit did not dispute the District Court's finding that "the plaintiffs had failed to advance any credible evidence that town employees intentionally excluded representatives of particular faiths." *Id.* at 25. The Circuit acknowledged that "anyone may request to give an invocation, including adherents of any religion, atheists, and the non-religious, and that it has never rejected such a request." *Id.* at 23. The Circuit concluded, "We ascribe no religious animus to the town or its leaders." *Id.* at 32. In fact, the Town has done as much as anyone could reasonably expect it to do to ensure that the prayer policy does not exclude anyone who wants to be included.

As the Town Board became aware of constitutional concerns, they broadened their policy. At first, one Town Supervisor Auberger invited people to lead in prayer. Then they used the list of places of worship in the Town's Community Guide to invite clergy. Then they began inviting religious leaders from places of worship not listed in the Community Guide and accepted requests from others who asked to lead in prayer. Those who have prayed in recent years include Christians, Jews, Baha'i, and a Wiccan priestess. Still other non-Christians have been invited.

If the prayers offered at Town Board meetings are predominantly Christian, that reflects only the fact that Greece is a predominantly Christian town. If the city councils of Berkeley, California, or of San Francisco, California, were to adopt the same prayer policy as Greece, the prayers offered at council meetings in Berkeley and San Francisco would undoubtedly be more cosmopolitan than those of Greece. Surely that does not mean that Berkeley and San Francisco can have prayer but Greece cannot, or that

Berkeley and San Francisco may use this policy but Greece must find another formula.

The Court's conclusion that the Town must go beyond its borders to publicly solicit prayer-givers from other religions or denominations, exceeds anything the First Amendment requires and, so far as *Amicus* can determine, anything any court has ever required before. "Affirmative action" may be permitted under the Equal Protection Clause; it is not required under the Establishment Clause. The Second Circuit has no authority to require this, and this Court should not sustain its attempt to do so.

IV. THE PRAYERS AT THE GREECE TOWN BOARD MEETINGS REFLECT A LONG AND UNBROKEN NATIONAL TRADITION OF OPENING PUBLIC DELIBERATIVE MEETINGS WITH PRAYER.

In *Marsh v. Chambers* at 792, this Court said that to "invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country." It also reflects a long and unbroken national tradition.

The Declaration of Independence of 1776 recognized the "Laws of nature and of nature's God" as the basis for American independence, creation by God as the basis for equality, and the rights of life, liberty, and happiness as endowed by the Creator. As the Constitutional Convention opened on 25 March 1787, Convention President George Washington told the delegates,

> Let us raise a standard to which the wise and honest may repair. The Event is in the hand of God.[5]

On 28 June 1787 Benjamin Franklin noted that during the War for Independence, "when we were sensible of danger we had daily prayer in this room [in Independence Hall] for the divine protection. Our prayers, Sir, were heard, and they were graciously answered." He then said:

> I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth- that God governs in the affairs of men. And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid? We have been assured, Sir, in the sacred writings, that "except the Lord build the House they labour in vain that build it." I firmly believe this; and I also believe that without his concurring aid we shall succeed in this political building no better than the Builders of Babel.

As noted earlier, on October 3, 1789 in his National Day of Thanksgiving Proclamation, George Washington addressed the nation saying, "It is the duty of all nations to acknowledge the providence of the Almighty God." President Thomas Jefferson said in his Second Inaugural Address,

> I shall need the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land, and planted

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[5] George Washington, March 25, 1787, as quoted by Gouverneur Morris in Max Farrand, *Records of the Federal Convention of 1787*.

> them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with providence, and our riper years with his wisdom and power; and to whose goodness I ask you to join with me in supplications that He will so enlighten the minds of your servants, guide their counsels, and prosper their measures, that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations. ...

In 1853 the Senate Judiciary Committee prepared a comprehensive study concerning the meaning of the Establishment Clause concerning the constitutionality of the Congressional chaplaincy:

> The clause speaks of "an establishment of religion." What is meant by that expression? It referred, without doubt, to that establishment which existed in the mother country, its meaning is to be ascertained by ascertaining what that establishment was. It was the connection with the state of a particular religious society, by its endowment, at the public expense, in exclusion of, or in preference to, any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or religious observances. These three particulars constituted that union of church and state of which our ancestors were so justly jealous, and against which they so wisely and carefully provided. ... Our fathers were true lovers of liberty, and utterly opposed to any constraint upon the rights of conscience. They intended,

> by this amendment, to prohibit "an establishment of religion" such as the English church presented, or anything like it. But they had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; *they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to send our armies and navies forth to do battle for their country without any national recognition of that God on whom success or failure depends;* they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of 'atheistical apathy.' Not so had the battles of the revolution been fought, and the deliberations of the revolutionary Congress conducted. On the contrary, all had been done with a continual appeal to the Supreme Ruler of the world, and an habitual reliance upon His protection of the righteous cause which they commended to His care.

The Reports of Committees of the Senate of the United States for the Second Session of the Thirty-Second Congress, 1852-53 (Washington, D.C.: Robert Armstrong, 1853) pp. 1-4. Senate Rep. No. 32-376 (1853) (emphasis added).

Having a clergyman come to the courtroom to lead the jury in prayer, was a common practice in early American courtrooms around the time of the drafting and ratification of the United States Constitution and the First Amendment (1787-81). In the early years after the Constitution was ratified, the Supreme Court was in session for only a few months out of the year,

so the Judiciary Act of 1789 gave Supreme Court Justices the added responsibility of presiding over the various federal circuit courts. John Jay was the first Chief Justice of the United States Supreme Court (1789-95) and an author of *The Federalist Papers* along with Alexander Hamilton and James Madison. A Connecticut judge, Richard Law, wrote to Chief Justice Jay on February 24, 1790, asking for guidance on how the new federal courts should be conducted. The letter is printed in the *Documentary History of the Supreme Court of the United States, 1789-1800*.[6]

> ...whether they would wish to give any Directions relative, to the preparation for their Reception in point of Parade, Accomidations or the like whether, any uniformity particularly Formalities of Dress is expectable, whether they would wish to have a Clergiman attend as Chaplin, as has been generally the Custom in the New England States, upon such Occasions.[7]

Chief Justice Jay answered Judge Law on March 10, 1790:

> It appears to me adviseable to respect ancient usages in all Cases where Deviations from them are not of essential importance. In my opinion the Judges on the Circuits should in the first Instance be recd in the Manner acustomed with respect to the Judges of the

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[6] *Documentary History of the Supreme Court of the United States*, Maeva Marcus, ed. (New York: Columbia University Press, 1988. Amicus has preserved the original spellings in most instances.

[7] *Id.* Vol. II p. 11.

> State sup. Courts__ If alterations should be expedient, they may be better introduced afterwards.
>
> No particular Dress has as yet been assigned for the Judges on the circuits. *The custom in New England of a clergyman's attending, should in my opinion be observed and continued.* For accommodations I presume there can be no Difficulty in any of the towns in which the Courts are to be held in New England__ I wish to lodge in a clean orderly Inn, for as to the Manner in which the Table may be served, it is among the least and last of my Cares. I thank you Sir![8]

It is significant that on some matters Jay said no determination had been made, on others he did not care, and on others it was best to follow the local usage at first and possibly deviate from it later. But on one matter Jay was clear and emphatic: The practice of clergy leading the jury in prayer should be not only "observed" but also "continued." At the time he wrote, Chief Justice Jay undoubtedly was aware that the First Amendment had been approved by Congress the previous year (1789) and was in the process of being ratified by the states.

And in fact the practice did continue, as early court records demonstrate:

> Circuit Court for the District of Massachusetts
>
> November 3, 1790 Boston, Massachusetts

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[8] *Id.* II:13 (emphasis added).

> The circuit court for Massachusetts opened on November 3, with Chief Justice John Jay, Associate Justice William Cushing, and Judge John Lowell in attendance. After the usual forms were gone through with, and the Grand-Jury impannelled, an excellent CHARGE was given them, by the Chief-Justice, and the Throne of Grace was addressed in prayer, by the Rev. Dr. STILLMAN. On November 5, the court adjourned to the next term.[9]

Court proceedings commonly were published in a local newspaper, and the *Documentary History of the Supreme Court of the United States, 1789-1800* contains this entry from a newspaper account:

> Procession was formed at the Senate-Chamber, and proceeded therefrom in the following order:
>
> Eight Constables, with staves.
>
> Deputy-Marshals BRADFORD and THOMAS.
>
> Marshal JACKSON.
>
> CHIEF JUDGE JAY.
>
> Judge CUSHING –Judge LOWELL
>
> Attorney of the U.S. – Attorney-General of this State.
>
> CLERK. – Rev. Mr. WEST.
>
> Barristers, Counsellors, other Gentlemen of the Bar,
>
> and Citizens, two and two.

---

[9] *Id.* II:105.

> The procession having arrived at the Court-House, and the usual Proclamations being made – a very respectable Grand Jury was sworn, (of which Mr. THOMAS HARRIS, of *Charlestown*, was appointed Foreman) – After which the CHIEF JUSTICE delivered to them a short and elegant extempore Charge. ...
>
> [The account then summarized Chief Justice Jay's charge to the Grand Jury.] ...
>
> The Throne of Grace was then addressed in prayer, by the Rev. Mr. WEST.[10]

The following account was published in the *New-Hampshire Gazette* (Portsmouth), May 26, 1791:

> Circuit Court for the District of New Hampshire
>
> May 24, 1791 Portsmouth, New Hampshire
>
> Pursuant to law, court convened with Chief Justice Jon Jay, Associate Justice William Cushing, and Judge John Sullivan in attendance. "After the customary proclamations were made and the Grand Jury sworn – a short, though pertinent charge was given them by his Honor the Chief Justice – when the throne of Grace was addressed by the Rev. Dr. Haven." The court adjourned on May 26 to the next term.[11]

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[10] *Id.* II:165.

[11] *Id.* II:192.

Another such account appears in the *Columbian Centinel* November 16, 1791:

> November 16, 1791 Boston, Massachusetts
>
> On Monday last the Circuit Court of Massachusetts District, opened in this town, before the Ho. Chief Justice JAY, and Judge LOWELL. After the customary formalities were over, the Chief Justice gave a short and elegant charge to the Grand-Jury. ...[The account then summarized Chief Justice Jay's charge.] ...
>
> After the charge, the Rev. Mr. Belknap addressed the Throne of Grace in prayer.
>
> Mr. JOHN GODDARD, of *Brooklyne*, was appointed Foreman of the Grand Jury, and Mr. JOHN CUTLER, of this town, Foreman of the Jury of Trials.[12]

The *Columbian Centinel* on May 16, 1792, reported that the Circuit Court for the District of Massachusetts opened on Saturday, May 12, with Chief Justice John Jay, Associate Justice William Cushing, and Judge John Lowell in attendance. On Monday, May 14, Jay delivered a charge to the grand jury. Jay's charge was

> ...replete with his usual perspicuity and elegance. The prayer was made by the Rev. Dr. PARKER. His Excellency the Vice President of the United States, was in Court.[13]

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[12] *Id.* II:231-32.

[13] *Id.* II:276.

After Supreme Court Justice James Wilson (a leading delegate to the Constitutional Convention) gave a charge to the Grand Jury for the Circuit Court for the District of Massachusetts on 7 June 1793, the *Columbian Centinel* reported that "After the Charge, the Rev. Dr. THACHER addressed the throne of Grace, in prayer."[14]

An entry from the *Providence Gazette* 16 November 1793 describes another court session:

> On Thursday, last Week, the Circuit Court of the United States was opened in this Town, before the Hon. Judge WILSON, and Judge MARCHANT. The Throne of Grace was addressed, in a Prayer well adapted to the Occasion, by the Rev. JAMES WILSON, Co-pastor of the Congregational Church on the West Side of the River; after which His Honour the presiding Judge delivered a pertinent and affecting Charge to the Grand Jury. ...[15]

Still another account of a New Hampshire Circuit Court session is found in the May 24, 1800 edition of the *United States Oracle* of Portsmouth, New Hampshire:

> On Monday last the Circuit Court of the United State was opened in this town.
>
> The Hon. Judge PATTERSON presided. After the Jury were empannelled, the Judge delivered a most elegant and appropriate Charge. – The *Law* was laid down in a masterly manner: *Politicks* were set in their

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[14] *Id.* II:406.

[15] *Id.* II:430.

> true light, by holding up the Jacobins, as the disorganizers of our happy Country, and the only instrument of introducing discontent and dissatisfaction among the well-meaning part of the Community: – *Religion & Morality* were pleasingly inculcated and enforced, as being necessary to good government, good order, and good laws, for "when the righteous are in authority, the people rejoice." [quoting Proverbs 29:2] ...
>
> After the Charge was delivered, the Rev. Mr. ALDEN addressed the Throne of Grace, in an excellent, well adapted prayer.[16]

Furthermore, the Supreme Court did not limit its holding in *Marsh v. Chambers* to prayer in legislatures. Rather, as noted earlier, the Court declared that "[t]he opening of sessions of *legislative and other deliberative public bodies* [with prayer] is deeply imbedded in ... history ... ." *Marsh v. Chambers*, 463 U.S. at 786 (emphasis added). *Marsh* further noted that the practice of prayer continues in courts today:

> In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an Announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.

Marsh, 463 U.S. at 786.

As Professor and Dean Robert J. Barth has noted in "Philosophy of Government vs. Religion and the First Amendment," *Oak Brook] Journal of Law and*

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[16] *Id.* III:436. These are only a few of many examples.

Government Policy V (2006), public recognition of God in the national pledge, national anthem, and other public documents or occasions is not an establishment of religion but rather the expression of the legal and political philosophy upon which the nation was established: that all persons are created by God and are therefore equal, that all are endowed by God with certain unalienable rights and therefore government is limited and must not infringe those rights, and that all are subject to the "laws of nature and of nature's God." The Supreme Court has sanctioned this philosophy in *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), stating, "We are a religious people whose institutions presuppose a Supreme Being." Dissenting in *McGowan v. Maryland*, 366 U.S. 420 (1961), Justice Douglas quoted the Declaration of Independence and stated, "The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect." *Id.* at 562.

CONCLUSION

In conclusion, the Establishment clause is not meant to restrict any acknowledgement of God through prayer at government meetings but to protect the people from the establishment of a specific sect or denomination. The Second Circuit, and this Court in previous Establishment Clause cases, recognize that sectarian vs. nonsectarian prayer test is not a constitutional test for judges to decide what prayers are appropriate in a specific set of circumstances. If the courts are allowed to evaluate prayer then they are policing prayers, entangling themselves in religious matters and eroding the neutrality they claim to

protect. Secularism is not a neutral position but one of nonbelief, and governmental preference for nonbelief creates hostility toward religion and violates the establishment clause by favoring secularism over religious perspectives. True neutrality allows the presence of sincere prayer when requested and nonbelief to coexist; not the exclusion of one and the presence of another. Therefore this court should uphold the District Court's ruling on the Town of Greece prayer practice and reverse the ruling of the Second Circuit.

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AMICUS CURIAE BRIEF

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TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF THE FREEDOM FROM RELIGION FOUNDATION IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICUS CURIAE

The Freedom From Religion Foundation ("Foundation"),[1] a national nonprofit organization based in Madison, Wisconsin, is the largest association of freethinkers, representing nearly 20,000 atheists and agnostics. The Foundation has members in every state, the District of Columbia, and Puerto Rico. The Foundation's two purposes are to educate the public about nontheism and to defend the constitutional separation between state and church.

The Foundation's interest in this case arises from its position that prayers at government meetings violate the Establishment Clause of the First Amendment to the United States Constitution. For this reason, the Foundation has worked to end prayers at legislative meetings throughout its history. The Foundation was originally formed in 1976 explicitly to protest prayers at the Madison (Wisconsin) Common Council. The Foundation sued the Wisconsin State Legislature in 1978 to stop paid legislative prayer. *Gaylor v. Risser,* 78-C-146 (W.D. Wis. 1983) (dismissed after *Marsh v. Chambers*, 463 U.S. 783 (1983)). Legislative prayer has become the second most common complaint citizens and members bring

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[1] This brief has not been authored, in whole or in part, by counsel for either party. No monetary contribution has been made to the preparation or submission of this brief other than the amicus curiae, its members or its counsel. Consent to this brief has been given by all parties and letters of consent have been filed with the Clerk.

to the Foundation's attention. Since 1989, the Foundation has written letters of complaint objecting to government prayer to more than 300 legislative entities, involving nearly every state. Foundation members have frequently been plaintiffs in lawsuits challenging government prayers.

ARGUMENT SUMMARY

Marsh should be overturned. This Court's most enduring decisions apply legal principles to overturn a long history of constitutional violations; its most tenuous decisions ignore legal principles and treat history as dispositive. *Marsh* does the latter. Government practices, like prayer, that co-existed with Congress's passage of the First Amendment or other amendments are not automatically constitutional – as the Sedition Act of 1798 and segregation illustrate. Even if *Marsh*'s originalist interpretation accurately reflected the framers' views on government prayer, which it did not, that interpretation can be incorrect – as Eighth Amendment jurisprudence shows. And sometimes, a long history is simply a longstanding injustice – as this Court's treatment of anti-miscegenation and discrimination against gay citizens demonstrates. In no other case involving the Religion Clauses has this Court placed history over principle as *Marsh* did.

Marsh's recitation of history is unsound. It missed significant facts and distorted others. *Marsh* relied on

congressional chaplaincies but overlooked the divisiveness that office engendered. *Marsh* relied on the First Congress's approval of chaplaincies to discern the framers' intent, but ignored framers' legal opinions against government prayer. *Marsh* relied on colonial prayers that were given years before the Constitution and First Amendment were adopted but minimized the fact that the framers did not pray during the Constitutional Convention when composing our godless Constitution.

Finally, *Marsh* wrongly subjugates fundamental rights to majority rule. Majority will does not trump rights. This country's rapidly shifting religious demographics should force this Court to revisit *Marsh*'s "tolerable acknowledgment" argument.

If this Court upholds *Marsh*, it should affirm the Second Circuit. Government prayer is government speech, as every court analyzing the issue, including the *Marsh* Court, has held. As government speech, Greece's prayers must comport with the Establishment Clause.

Contrary to Greece's assertions, coercion is not required to prove an Establishment Clause violation. Regardless, Greece's prayers are coercive and fail to accomplish any legitimate secular purpose.

Greece's prayers violate the Establishment Clause. Unlike the prayers in *Marsh* they are consistently sectarian, advance Christianity over other religions and religion over nonreligion, and proselytize. These violations are magnified because local governments,

like Greece, work in greater proximity to citizens than a state legislature as in *Marsh*. Nor do Greece's prayers accomplish the purpose of solemnizing government occasions: Christian prayers only solemnize for Christians – they exclude everyone else.

This Court should reverse *Marsh*. This Court has a long, hallowed tradition of overturning past mistakes. It is principle that this Court should revere, not the flawed, incomplete history laid out in *Marsh*. *Marsh* is unsalvageable and should be overturned.

Alternatively, this Court should affirm the Second Circuit.

ARGUMENT

I. *Marsh* is an outlier that should be overturned because it: (A) treats history as dispositive; (B) relies on flawed history; and (C) allowed demographics to trump constitutional rights.

A. *Marsh* is an outlier because this Court does not allow history to trump legal principles in any other context.

Marsh is an outlier. "[I]f the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause." *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting). *Marsh* abandoned legal principles in favor of distorted

history, granting government prayer constitutional immunity because it pre-dates the First Amendment.

Unlike every other Establishment Clause decision, *Marsh* abjured the defining principle of Establishment Clause jurisprudence: "the principle that the 'First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.'" *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

Instead, *Marsh* let history trump the Constitution. Professor McConnell's criticism of *Marsh*'s historical approach is as accurate as it is devastating:

> *Marsh v. Chambers* represents original intent subverting the principle of the rule of law. Unless we can articulate some *principle* that explains *why* legislative chaplains might not violate the establishment clause, and demonstrate that that principle continues to be applicable today, we cannot uphold a practice that so clearly violates fundamental principles we recognize under the clause.

Michael McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362 (1988).

This Court rarely elevates history over principles in constitutional interpretation. This is because, as Justice Kennedy recently observed, "[f]reedom is always a work in progress." Opening Remarks at the American Bar Association Annual Meeting (Aug. 10, 2013). James Madison put it differently: "Is it not the

glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered ***a blind veneration*** for antiquity . . . ?" THE FEDERALIST NO. 14 (James Madison) (emphasis added).

Marsh ignored Madison and upheld legislative prayer based on what it mistakenly described as an "unambiguous and unbroken history of more than 200 years." 463 U.S. at 792. *Marsh* is "based squarely and exclusively on the historical fact that the framers of the first amendment did not believe legislative chaplains to violate the establishment clause." McConnell, *supra*, at 362. *Marsh*'s "blind veneration" for history rather than legal principles is unique and unjust.

1. Legislation adopted contemporaneously with the First Amendment is not automatically constitutional.

Marsh erred in relying on government prayer that occurred contemporaneously with an amendment's adoption to hold that the prayers complied with that amendment. The framers passed other legislation contemporaneously with the First Amendment that clearly violated that amendment. *Marsh* "noted that seventeen Members of that First Congress had been Delegates to the Constitutional Convention where freedom of speech, press and religion [were discussed and this Court] saw no conflict with the Establishment Clause. . . ." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) (discussing *Marsh*). The

Sedition Act of 1798 was passed seven years after the First Amendment was ratified. At least ***twenty-four*** members of the Congress that proposed the First Amendment were members of the Congress that passed the Sedition Act. Others occupied higher federal posts, including John Adams who was President of the Senate that proposed the First Amendment but signed the Sedition Act into law as President of the United States.

Under the *Marsh* rationale, this history should "lea[d] us to accept the interpretation of the First Amendment draftsmen who saw" the Sedition Act as conforming to the First Amendment. 463 U.S. at 791. Yet, the Sedition Act is now universally condemned, both "in the court of history" and "by Justices of this Court." *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964). Government prayer's co-existence with the First Amendment's passage cannot save it.

2. Practices contemporaneous with the adoption of other amendments have been declared unconstitutional.

In *Brown v. Board of Education*, this Court heard "reargument . . . largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868" including exhaustive coverage of "then existing practices in racial segregation, and the views of proponents and opponents of the Amendment." 347 U.S. 483, 489 (1954). But *Brown* did not use the rampant history of segregation at the time of the

Fourteenth Amendment's passage to determine the constitutionality of school segregation; instead it applied a legal principle to contemporary circumstances:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* [163 U.S. 537 (1896)] was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Id. at 492-93. Had the Court treated history as dispositive, *Brown* would have been another *Plessy*. Instead, the Court applied principles, and segregation was declared unconstitutional.

3. History may clearly show the framers' interpretations of amendments, but this Court is not bound to treat those interpretations as dispositive.

Marsh treated what it thought was the framers' interpretation of the First Amendment as dispositive, but this Court has disregarded original interpretations of the Eighth Amendment, which would exclude only "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989) (citations omitted), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005).

The historical interpretation would permit the execution of children over the age of seven because the framers thought it legal. This Court, in an opinion by Justice Kennedy, rejected this interpretation after "considering history. . . ." *Roper*, 543 U.S. at 560. Instead, Justice Kennedy "referr[ed] to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual." *Id.* at 561 (citations and quotations omitted). Justices Stevens and Ginsburg concurred, noting that "[i]f the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children. . . ." but "that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text." *Id.* at 579 (Stevens, J., concurring).

History clearly shows that the framers interpreted the amendment so that children seven and older could be lawfully executed. Despite this unambiguous history, the Court repudiated the framers' interpretation in favor of the underlying principle.

4. The duration and extent of a historical practice do not render it constitutional.

This Court has declared other practices dating from colonial history constitutional violations. The

200-year history of prayer extolled in *Marsh* is evidence of a longstanding violation, not legitimacy. Until *Loving v. Virginia*, "penalt[ies] for miscegenation" were common and had been "since the colonial period." 388 U.S. 1, 5-6 (1967). Hugh Davis received the earliest recorded punishment in 1630. Davis was "soundly whipped before an assembly of Negroes and others for abusing himself to the dishonor of God and the shame of Christians by defiling his body in lying with a negro; which fault he is to acknowledge next Sabbath Day." Walter Wadlington, *The Loving Case; Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1191 (1966).

Instead of relying on history and religious tradition, *Loving* relied on legal principles and the self-evident truth that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." 388 U.S. at 12 (citations omitted). The Court correctly rejected the idea that a long history of anti-miscegenation could limit the right to marry. The Court "should be wary of any interpretive theory that implies, emphatically, [that *Loving*] was not [correctly decided]." *McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020, 3118 (2010) (Stevens, J., dissenting) (citations omitted).

5. A longstanding practice can simply be a longstanding violation, not a valid exercise of government power.

Legalized discrimination against gay citizens was, until very recently, deeply rooted in this nation's history and tradition. *See Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (upholding criminalization of sodomy), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003). Chief Justice Burger's entire concurrence in *Bowers* argues that history validates discrimination against gay persons:

> [H]omosexual conduct ha[s] been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards. . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

Id. at 196-97 (1986) (Burger, C.J., concurring).

Writing for the Court, Justice Kennedy rejected this history in favor of the "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Lawrence*, 539 U.S. at 572. This Court, again with Justice Kennedy writing, has continued to protect the rights of gay citizens in spite of the long history of legal oppression. *See United States v. Windsor*, 133 S.Ct. 2675 (2013) (excluding same-sex partners from legal definition of spouse

"violates basic due process and equal protection principles applicable to the Federal Government").

6. This Court focuses on principle, not history when interpreting the Religion Clauses.

This Court has refused to apply the historical interpretation to other cases involving the Religion Clauses:

> At one time it was thought that [the freedom of conscience] merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.

Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985) (footnotes omitted). This Court has consistently adhered to this interpretation, even though the framers may have had a different interpretation. *See, e.g.*, *Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 18 (1947) (government must "be neutral in its relations with groups of religious believers and non-believers"); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 27 (1997) (Blackmun, J., concurring) (the "government may not

favor religious belief over disbelief"). Government prayer contravenes this function of the Establishment Clause.

Had school-related Establishment Clause cases been decided like *Marsh*, students' rights of conscience would be violated daily. *McCollum v. Board of Education* ignored the lone dissent of Justice Reed who specifically argued that devotion to "principle . . should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people. . . [T]he history of past practices is determinative of the meaning of a constitutional clause. . . " 333 U.S. 203, 256 (1948).

Abington v. Schempp noted the "long history . . . [of] Bible reading and daily prayer in the school" from private sectarian schools in 1684 until "free public schools supplanted [them] between 1800 and 1850" and beyond. 374 U.S. 203, 267-68 (1963) (Brennan, J., concurring). The Court correctly treated this as a history of violation, not validation.

Lee v. Weisman overturned prayers "at public-school graduation ceremonies . . . a tradition that is as old as public-school graduation ceremonies themselves. . . ." 505 U.S. 577, 631-32 (1992) (Scalia, J., dissenting). The Court relied on principle, "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Id.* at 587.

Some of this Court's most precarious decisions venerated history. *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (emphasis added below) relied on:

- "[*T*]***he legislation and histories of the times, and the language used in the Declaration of Independence, show***, that neither . . . slaves, nor their descendants . . . were then acknowledged as a part of the people. . . ." *Id.* at 407.

- " . . . ***the following are truths which a knowledge of the history of the world, and particularly of that of our own country***, compels us to know – that the African negro race never have been acknowledged as belonging to the family of nations; . . . and that the introduction of that race . . . was not as members of civil or political society, but as slaves, as property in the strictest sense of the term." *Id.* at 475 (Daniel, J., concurring).

- "By the references above given it is shown, from the nature and objects of civil and political associations, ***and upon the direct authority of history***, that citizenship was not conferred by the simple fact of emancipation. . . ." *Id.* at 479-80 (Daniel, J., concurring).

- "[*T*]***he history of the Confederation and Union affords evidence to attest the existence of this ancient law*** [that a master may reclaim his bondsman]." *Id.* at 496 (Campbell, J., concurring).

When this Court upheld laws limiting work hours for women but not men, it did so partly because, "history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present." *Muller v. Oregon*, 208 U.S. 412, 421 (1908). *See also Bradwell v. Ill.*, 83 U.S. 130, 141 (1872) (citing the "historical fact[s]" that the right to practice law was never "established as one of the fundamental privileges and immunities of [woman]" and that the "family organization, which is founded in the divine ordinance . . . is repugnant to the idea of a woman adopting a distinct and independent career.").

Conversely, this Court's most enduring decisions, like *Brown* and *Loving,* reject the "blind veneration" of history. This Court should focus not on history, but on legal principles as it did in *Brown*, *Loving*, *Roper*, and *Jaffree*. It should overturn *Marsh* on principle, and because the history *Marsh* treats as dispositive is flawed.

B. The "malleability and elusiveness" of history tainted *Marsh*'s historical analysis: it missed significant historical facts and misconstrued the facts it relied on to reach erroneous conclusions.

Posterity condemns decisions that treat history as dispositive because of history's "malleability and elusiveness." *McDonald,* 130 S.Ct. at 3117 (Stevens, J., dissenting). Much history eluded *Marsh*, and

the few historical facts in the opinion were distorted to reach subjective and incorrect historical conclusions.

1. The "elusiveness" of history: *Marsh* omits significant historical facts.

While "the world is not made brand new every morning," history is not static. *McCreary*, 545 U.S. at 866. New historical evidence undermines constitutional interpretation based on partial history. For example, in *Van Orden v. Perry*, the "determinative" factor of the controlling opinion upholding a Ten Commandments monument on public land was the apparent absence of divisiveness during the monument's history:

> 40 years [have] passed in which the presence of this monument, legally speaking, went unchallenged. . . . Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage. . . . This display has stood apparently uncontested for nearly two generations.

545 U.S. 677, 702-04 (2005) (Breyer, J., concurring). This history is wrong. Citizens challenged the legality of the monument in 1977 and possibly earlier; but Texas ignored those challenges. Madalyn Murray

"O'Hair asked [the Governor] to ***request an attorney general's opinion on the constitutionality of displaying*** a crèche scene in a public building and ***having a monument inscribed with the Ten Commandments on Capitol grounds, but the governor's aides refused.***" *O'Hair Wants Nativity Scene Out*, THE GALVESTON DAILY NEWS, Nov. 16, 1977, at 16B (emphasis added). *See also, Atheist leader disapproves*, CORPUS CHRISTI TIMES, Nov. 16, 1977, at 4A (showing O'Hair in front of the *Van Orden* monument 28 years before the decision: "Atheist leader disapproves . . . said the tablet, containing the Ten Commandments, violates the principle of separation of church and state."); Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernisms*, 61 CASE W. RES. L. REV. 1211 (2011).

This Foundation and our Texas membership wrote multiple letters of complaint to Texas governors from the time co-founders Anne Nicol Gaylor and Annie Laurie Gaylor first visited the Texas Capitol in 1977, until our final letter, sent in September 2001, prior to Mr. Van Orden's lawsuit. Declaration of Annie Laurie Gaylor at 7-9, *Freedom From Religion Foundation v. Weber*, No. 9:12-cv-00019-DLC (D. Mont. Feb. 13, 2013).

The "determinative factor" in the controlling opinion – forty years of undivisive history – was wrong.

Marsh contains far more egregious historical omissions. *See, e.g.*, Christopher Lund, *The Congressional Chaplaincies*, 17 WM. & MARY L. REV. 1171 (2009). For instance, *Marsh* erroneously concluded that the framers did not "perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church." 463 U.S. at 793. But John Quincy Adams wrote that people believed *precisely* that:

> Mr. Sparks, the Unitarian['s], . . . election as chaplain to the House of Representatives . . . has been followed by unusual symptoms of intolerance. Mr. Hawley, the Episcopal preacher at St. John's Church, . . . preached a sermon of coarse invective upon the House, who, he said, by this act had voted Christ out-of-doors; and he enjoined all the people of his flock not to set their feet within the Capitol to hear Mr. Sparks. . . . Patterson, a member from the State of New York, moved that the House should proceed to the choice of another Chaplain. . . .

John Quincy Adams, 5 *Memoirs of John Quincy Adams*, 458-59 (Charles Francis Adams ed., Lippincott & Co. 1875).

Even the first chaplain election was divisive:

> In our congress, however, they sometimes set religion at nought [*sic*]. When a vote was taken for a chaplain . . . there were three votes given for Matthew Lyon and one for Tom Paine. . . . and where such contempt is

> expressed for religion, what care would be taken to preserve it?

Theodore Dwight, *President Dwight's Discussions of Questions discussed by the senior class in Yale College in 1813 and 1814*, 114, 229 (Jonathan Leavitt, New York, 1833). The votes for Lyon and Paine, both critics of religion, were a condemnation of congressional chaplains. This divisiveness is certainly worthy of mention, and, unlike the divisiveness unknown in *Van Orden*'s controlling opinion, was known to the *Marsh* Court.

2. The "malleability" of history: *Marsh* minimized and distorted history to reach erroneous conclusions.

Many historical facts eluded *Marsh*, but the Court also minimized and misconstrued the few facts it identified to reach incorrect conclusions. *Marsh* used "what historians properly denounce as 'law office history,' written the way brief writers write briefs, by picking and choosing statements and events favorable to the client's cause." Philip B. Kurland. *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 842 (1985). *Marsh* relied almost exclusively on two misconstrued historical facts: (a) the First United States Congress approving a bill for congressional chaplains and (b) a colonial tradition of prayer, including prayer at the First Continental Congress.

a. *Marsh* relied on the First Congress approving chaplaincies to discern their views on government prayer, but ignored the framers' stated legal opinions against government prayer.

The term "framers" is convenient shorthand, but too often disguises the fact that those men rarely all agreed. Just as some framers opposed the unconstitutional Sedition Act of 1798 but could not stop its enactment, some framers opposed legislative prayers. James Madison, the Father of the Constitution and the Bill of Rights, opposed both, and *Marsh*'s treatment of his legal opinion exemplifies its mistreatment of history.

Madison's *Virginia Resolution* condemned the Sedition Act and his *Detached Memorandum* condemned congressional chaplains and prayers stating, "[t]he establishment of the chaplainship to Congress is a palpable violation of equal rights, as well as of Constitutional principles." Elizabeth Fleet, Madison's "Detached Memoranda," 3 WM. & MARY QUARTERLY 534 (1946). He was equally critical of "religious proclamations" by the government, calling them "shoots from the same root." *Id.*

Madison's legal opinion opposing chaplains was relegated to a footnote in *Marsh*. 463 U.S. at 791 n.12. This Court does not always discount Madison's legal opinions, quite the opposite: his *Virginia Resolution* was discussed at length in the Court's interpretation

of the First Amendment in *New York Times*, 376 U.S. at 273-76.

Curiously, *Marsh* ignored Madison's opinion on chaplains while citing his vote on and passage of an appropriations bill generally. 463 U.S. at 787 n.8. The bill approved chaplains, but was not about chaplains – it authorized salaries for government officials, including those voting on the bill. Act of Sept. 22, 1789, ch. 17, 1 *Stat.* 70. Madison specifically condemned the chaplaincy section writing that " . . . it was not with my approbation, that the deviation from it took place in Congress when they appointed Chaplains, to be paid from the National Treasury." Letter to Edward Livingston (July 10, 1822).

Partly from passage of the appropriations bill, *Marsh* concluded that "the First Amendment draftsmen . . . saw no real threat to the Establishment Clause arising from a practice of prayer." 463 U.S. at 791. The more reasonable conclusion: Congress acted in simple self-interest. The men voting on the bill had been serving at their own expense. No doubt they paid more attention to the salaries attached to the positions than the legality of the chaplaincy buried in the fourth of seven sections. This comports with the low attendance at the prayers: "[T]he Reverend Ashbel Green, . . . one of the chaplains for eight years from 1792 on, complained of the thin attendance of members of Congress at prayers. He attributed the usual two-thirds absences to the prevalence of free-thinking." A.P. Stokes, I *Church and State in the United States*, 457 (Harper & Brother, 1950).

The First Congress "saw no real threat to the Establishment Clause" because they did not look for one. The First Congress approved chaplains and prayers without vetting them through the First Amendment, which had just been written, but would not be ratified or have any legal effect for another two years.

This interpretation is supported by the discussion on government prayer, in the form of presidential proclamations of thanksgiving that followed the appropriation bill vote. Opponents of government prayer relied on the Constitution and law while proponents relied on "holy writ," the Bible, and prayers at the Continental Congress.

Thomas Tucker (S.C.) thought:

> [T]he House had no business to interfere in a matter [prayer] which did not concern them. Why should the President direct the people to do what, perhaps, they have no mind to do? . . . it is a business with which the Congress have nothing to do; it is a religious matter, and, as such, is proscribed to us.

I Annals of Cong. 950, Sept. 25, 1789. Roger Sherman (Conn.) countered Tucker. Sherman "justified the practice of thanksgiving . . . as warranted by a number of precedents in holy writ; for instance, the solemn thanksgivings and rejoicings which took place in the time of Solomon, after the building of the temple . . . This example, he thought, worthy of Christian imitation . . . " *Id.* The only other speaker in favor, Elias

Boudinot (N.J.) relied on pre-Constitutional "precedents from the late Congress," a mistake *Marsh* repeated as discussed below. *Id.*

Madison and Tucker are the only framers to offer legal opinions on government prayer. Both thought it unconstitutional. *Marsh*'s conclusion that "the First Amendment draftsmen . . . saw no real threat to the Establishment Clause" is wrong. 463 U.S. at 791.

b. *Marsh*'s reliance on pre-Constitutional prayers is illogical and historically inaccurate.

Like Mr. Boudinot, *Marsh* mistakenly relies on the Continental Congress's prayers. 463 U.S. at 787-91. First, it is illogical to base constitutional interpretation on prayers given fifteen years before the Constitution was ratified and seventeen years before the First Amendment was ratified. The colonies had not declared independence; we were still part of Great Britain. The prayers' legality could not possibly be determined when the document, legal system, and country constraining them had not yet been invented.

Second, the pre-Constitutional prayers were not an outpouring of piety; they were a political expedient. John Adams recorded the prayers as a political calculation. He wrote that during dinner with Samuel Adams and fellow-delegate Joseph Reed, Reed said "we were never guilty of a more Masterly Stroke of Policy, than in moving that Mr. Duché might read prayers." John Adams's Diary (Sept. 10, 1774), in 1

Letters of Delegates to Congress 1774-1789, at 60 (Paul H. Smith ed., 1976).

Finally, the colonial prayer tradition was not unbroken as *Marsh* claimed. 463 U.S. at 792. After reaping the political benefit of the first prayer, the Continental Congress had no further prayers for eight months, until May 11, 1775. 1 J. of the Continental Cong. (1775) Vol. II, 13. The sporadic prayers given between March 1, 1781, and June 21, 1789, occurred under the Articles of Confederation. The Articles were seriously defective and replaced by the Constitution after eight years. Whereas the Articles hardly recognized the separation between church and state, the Constitution fully incorporated that separation.

Significantly, there were no prayers at the Constitutional Convention. *Marsh* minimizes this fact, calling it "an oversight." 463 U.S. at 824 n.6. *Marsh* quotes Ben Franklin's prayer proposal, mistakenly claiming it was rejected for a lack of funds. *Id.* Funding was part of the debate, but Franklin himself noted that prayer was rejected because, "The Convention, except three or four persons, thought Prayers unnecessary." 1 *The Records of the Federal Convention of 1787*, at 452 n.15 (Max Farand ed., 1911). The framers purposefully drafted our entirely godless and secular Constitution without divine appeal.

This Court should not uphold religious privilege in a "blind veneration for antiquity" but stand with

posterity and eliminate legislative prayer altogether as the Constitution requires.

C. As a result of elevating history over principle, *Marsh* subjugates fundamental rights to majority rule.

In addition to ignoring neutrality – the defining principle of Establishment Clause jurisprudence – and placing selective history above principle, *Marsh* failed by allowing demographics to trump fundamental rights.

Marsh betrays the purpose of the Bill of Rights by finding that legislative prayer is "simply a tolerable acknowledgment of beliefs widely held among the people of this country." 463 U.S. at 792. Practices are not constitutional simply because their underlying beliefs are widely held. This Court has repeatedly affirmed that "fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 304-05 (2000) (quoting *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 638 (1943)). Indeed, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Barnette*, 319 U.S. at 638. Put simply, "we do not count heads before enforcing the First Amendment." *McCreary*, 545 U.S. at 884 (O'Connor, J., concurring).

Although popularity is legally irrelevant, the "beliefs" underlying prayer are rapidly declining. Almost 20% of Americans are now nonreligious, up from 15% in 2007, and 8% in 1990. Pew Research Center, "Nones on the Rise: One-in-Five Adults Have No Religious Affiliation," *The Pew Forum on Religion & Public Life*, 13 (October 9, 2012); Barry Kosmin, *National Survey of Religious Identification* (1990) (for 1990 statistic). The three-fold increase from 20 to 61.5 million adults since 1990 makes "nones" the fastest growing self-identification and the second largest group after Roman Catholics. *Id.* (percentages applied to U.S. Census population estimates). One-third of Americans under 30 consider themselves nonreligious while less than one-in-ten over 65 consider themselves nonreligious. *Id.* at 10. For the first time, less than half the country (48%) is Protestant. *Id.* at 13. The number of self-identifying U.S. atheists and agnostics is more than triple the number of Mormons, and equal to Jews, Muslims, Hindus, and Buddhists *combined*. *Id.* at 9, 13. Religious belief is no longer as "widely-held" as when *Marsh* was decided.

D. *Marsh* is unsalvageable and should be overturned.

Marsh repudiates all settled legal doctrine by treating history as dispositive, ignoring constitutional principles, and placing the beliefs of a shrinking majority over the rights of religious minorities. If this Court insists on upholding *Marsh*, it must place simple,

cognizable restraints on legislative prayer based in Establishment Clause jurisprudence.

II. Legislative invocations are government speech subject to Establishment Clause restrictions.

Legislative invocations at official government meetings are government speech. Government messages, even if delivered with some indicia of private involvement, remain government speech. Thus, prayers delivered for Greece by invited clergy are government messages subject to the Establishment Clause.

A. Government prayer is government speech.

A government may express its own views: "[a] government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message." *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009). *Summum* held that a city's display of privately donated monuments was government speech. *Id.* at 464. Such displays were not forums for private expression primarily because only a "limited number" of persons were able to speak. *Id.* at 478-79.

Even when government-sanctioned messages are not treated as pure government speech, the speech is subject to the Establishment Clause. For instance,

a crèche in a county courthouse violated the Establishment Clause despite a sign disclosing its private ownership:

> [T]he sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own. But the Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations.

County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 600 (1989).

Likewise, *Santa Fe* held that prayers delivered under a government policy and practice constituted government speech largely *because* they were authorized by that government policy and occurred on government property at a government-sponsored event. 530 U.S. at 302. There was no limited public forum because the school authorized only one student to give the invocation and limited the topic of the student's invocation. *Id.* at 303, 306 (noting that speakers select particular words but that prayers must be "consistent with the goals and purposes of this policy."). The Court held that "the delivery of such a message . . . is not properly characterized as 'private' speech." *Id.* at 310.

Most significantly, *Marsh* treated the chaplain's prayers as government speech subject to the Establishment Clause. 463 U.S. at 792-95. Were the chaplain's

invocations private speech, *Marsh*'s Establishment Clause analysis would have been superfluous.

Indeed, every court that has addressed the issue has treated the prayers as government speech. *See, e.g., Joyner v. Forsyth County, N.C.*, No. 1:07CV243, 2009 WL 3787754 (M.D.N.C. 2009) ("Defendant's invocation prayers are government speech."), *aff'd*, 653 F.3d 341 (4th Cir. 2011); *Turner v. City Council of City of Fredericksburg, VA*, 534 F.3d 352, 353 (4th Cir. 2008) ("the prayers at issue here are government speech"); *Hinrichs v. Bosma*, 440 F.3d 393, 402 n.5 (2006) (noting speech limitations when speaking on behalf of the government) *Simpson v. Chesterfield County Bd. of Sup'rs*, 404 F.3d 276, 288 (4th Cir. 2004) ("the speech . . . was government speech"); *Rubin v. City of Burbank*, 101 Cal. App. 4th 1194, 1207 (2002) ("[W]e are satisfied that it was not 'private speech.'"). Government prayer is government speech and is therefore subject to the Establishment Clause.

As government speech, restrictions on government prayer do not violate the free speech or free exercise rights of clergy or government officials who remain free to pray on their own time.

B. Greece's prayers are government speech.

Greece holds a monthly meeting in the Town Hall that includes a scheduled "moment of prayer." J.A. 27a-43a. Each prayer "moment" is limited to one clergy member. *Id.* Given the limited number of meetings, the opportunity is restricted to roughly a dozen

clergy per year – almost always Christian. A Greece employee identifies and schedules the prayer-givers. C.A. App. A177. During the meetings, the Town Supervisor John Auberger summons the prayer-giver to a podium emblazoned with the Town's seal to deliver what Auberger frequently describes as "our prayer." J.A. 45a-90a, 99a, 123a, 130a. The podium sits between the dais and the audience and a town employee turns it to directly face the audience, rather than council members. *See* Exhs. 701-807, 811-29.

Any reasonable observer under these circumstances would view the prayers as having Greece's stamp of approval. Greece has decided to speak through invited clergy during its "moment of prayer." It seeks out prayer-givers, not speakers. Greece arranges for clergy – not to speak on a topic of their choice – but to *pray at* citizens.

Significantly, Greece schedules a true open forum – a public comment period for citizens to speak on a broad array of topics. This simple fact belies Greece's argument that its prayer is private speech, which would gut *Marsh* and curiously result in two public forums: a privileged one for clergy and another for citizens. If followed, Greece's argument would allow prayer-leaders to exploit the prayer opportunity to proselytize, disparage, and advance religion in contradiction of *Marsh*. Government invocations would then be overt avenues for religious promotion and recruitment. The prayers are government speech, not private speech in a bona fide forum. As such, the

invocations in Greece are subject to the Establishment Clause.

III. The Establishment Clause prohibits government speech, like Greece's prayers, that advance religion.

Justice Brennan correctly observed in his *Marsh* dissent, "if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional." 463 U.S. at 800-01. This is because *Lemon* requires the application of legal principles, something *Marsh* mostly avoided. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Marsh's sole attempt to apply legal principles limited legislative prayers to those where "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U.S. at 794-95. Greece's *amici* seek to gut this protection. But the proselytize, advance, disparage safeguard ("safeguard") is the only protection to ensure that legislative prayer complies with the Establishment Clause. *Marsh*, 463 U.S. at 793-95. As such, the safeguard should be interpreted in light of Establishment Clause principles.

Greece deals with this case as a hypothetical ignoring the facts and arguing that its prayer practice under *Marsh* "presents no constitutional concerns" because the only constitutional inquiry is whether the government "purposely" advances religion by coercing

participation. Brief of Pet'r at 12-13, 18. This is incorrect because: (A) coercion is not necessary to prove an Establishment Clause violation, (B) the prayers accomplish no secular purpose, and (C) the intent behind government action is not the only Establishment Clause question; effects matter too. The facts show not the breezy hypothetical Greece desires, but prayers that breach the *Marsh* safeguard.

A. Coercion is not required to prove a violation of the Establishment Clause.

Petitioners rely on an artificially heightened Establishment Clause standard that requires coercion as forced participation in religious worship. While such coercion is sufficient to demonstrate a violation, it has never been necessary. *See Engel v. Vitale*, 370 U.S. 421, 430 (1962).

Under a coercion analysis, forced participation is not required – any pressure from an entity as powerful as the government is coercive:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of

> government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

Id. at 430-31. In short, "[e]ven subtle pressure diminishes the right of each individual to choose voluntarily what to believe." *Lee*, 505 U.S. at 605-06.

B. Greece's prayers fail to accomplish any secular purpose.

Marsh ignored the purpose inquiry typical of Establishment Clause jurisprudence, noting only that legislative prayer is "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *See, e.g.*, *McCreary*, 545 U.S. at 861 (refusing to abandon or truncate *Lemon*'s purpose test); *Marsh*, 463 U.S. at 792. Justice O'Connor expanded the "tolerable acknowledgement" theme noting that legislative prayer and "government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring). Had the *Marsh* Court investigated the alleged solemnization rationale, it would have discovered flaws.

First, religion only solemnizes events for its adherents. Christian prayers solemnize for Christians,

Muslim prayers solemnize for Muslims, etc. For nonadherents and the 20% of nonreligious Americans, government prayer simply excludes. It tells nonbelievers their nonreligious views are wrong. It "sends the ancillary message to . . . nonadherents 'that they are outsiders, not full members of the political community and accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe*, 530 U.S. at 309-10 (quoting *Lynch*, 465 U.S. at 668) (O'Connor, J., concurring).

Second, for nonadherents and nonreligious citizens, government prayer not only fails to solemnize governmental proceedings, it defeats that purpose. Invoking a god or gods in whom many citizens may not believe alienates those citizens and, to them, confers an air of insult or even sacrilege upon the proceedings, rather than solemnity.

Third, even nonsectarian government prayer fails to solemnize. The nonsectarian nature of the prayers was crucial in *Marsh*. 463 U.S. at 793 n.14. *See also Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 36 (2004) (O'Connor, J., concurring) ("The constitutional value of ceremonial deism turns on a shared understanding of its legitimate nonreligious purposes."). While nonsectarian prayer is clearly required by *Marsh* and a step in the right constitutional direction, not all sects agree on public worship. James Madison recalled "a project of a prayer . . . intended to comprehend & conciliate College Students of every Christian denomination," but recognized that the project "must have failed, notwithstanding its winning

aspect from the single cause that many sects reject all set forms of Worship." Letter to Edward Everett (March 19, 1823). And many Christians take Jesus' Sermon on the Mount seriously and find public, governmental prayer a form of degradation, not solemnization: "[W]hen you pray, do not be like the hypocrites, for they love to pray standing in the synagogues and on the street corners to be seen by others. . . . when you pray, go into your room, close the door and pray to your Father, who is unseen." Matthew 6:5-6 (*NIV*). Thus, to those who find public prayer – nonsectarian or otherwise – sacrilegious and to nonbelievers, even nonsectarian prayers fail to solemnize government meetings.

Lastly, religion is not "the only reasonable way" to solemnize. Greece successfully solemnized every meeting until 1999 without prayer. Beating the gavel, pledging allegiance, calling for order, or having a moment of silence would *actually* solemnize the occasion without favoring one religion over others and religion over nonreligion.

Even were solemnization a valid purpose, Greece's prayers go beyond acknowledgement or solemnizing: they are quintessentially Christian worship.

C. Greece's prayers proselytize and advance religion.

Greece argues that the only relevant inquiry is whether it "purposely" sought to proselytize, advance, or disparage religion. But purpose, like history, is not

dispositive. The actual *effects* of government practices must also be reviewed. Government speech, including prayers, may not appear to give official government support to a religion and may not inculcate its religious doctrines.

Greece runs from the facts of this case in order to avoid the safeguard inquiry. But the prayers here (1) advance Christianity in relation to other religions, (2) proselytize for Christianity, and, (3) because they involve a local government, have a magnified effect on citizens.

First, prayers advance religion if they are sectarian. *Marsh* held that the Nebraska legislature's prayers did not advance religion because the prayers were "'nonsectarian,' 'Judeo-Christian,' and 'with elements of the American civic religion'" that "removed all references to Christ." 463 U.S. at 793 n.14. Even Justices who find other governmental ecumenical religious practices to be acceptable have not doubted the unconstitutionality of sectarian endorsements. Justice Scalia has pointed out that sectarian endorsements are unconstitutional:

> [O]ur constitutional tradition . . . [has] ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).

Lee v. Weisman, 505 U.S. at 641 (Scalia, J., dissenting). Greece residents differ greatly in their views on

the divinity of Jesus and the Christian religion, yet their government takes sides on matters of individual conscience. Greece's prayers are sectarian. They specify sectarian details, quote scripture and expound Christian theological doctrine, including the "divinity of Christ." They go beyond solemnization into Christian worship:

- "God's blessed us tremendously and so, it reminds me of just one verse in the Bible about our Lord's coming, about the birth of Christ. . . . 'For unto us a child is born; unto us a son is given. And the government shall be upon his shoulder, and his name shall be called wonderful, counselor, the mighty God, the everlasting father, and the Prince of Peace." [Quoting Isaiah 9:6]. J.A. 94a.

- "O Lord we thank you once again that you are directing our lives and directing this town. We give you all the praise and glory and honor in Jesus' name." J.A. 31a.

- "[A]nd Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day into your kingdom as good and faithful servants. We ask this in the name of our brother Jesus. Amen." J.A. 45a.

- "You are also a wise God, oh Lord, as seen in the world around us, and as evidenced even in the plan of redemption that is fulfilled in Jesus Christ." J.A. 99a.

- "And we ask this thinking about Good Friday and Easter coming ahead. We thank you for that Good News as well, but we ask this through Jesus Christ, amen." J.A. 73a.

One prayer-giver asked the audience to join in the recitation of the "Our Father" from the Christian Bible, Matthew 6:9-13. J.A. 56a. Alex Bradshaw gave a sermon, masquerading as a prayer on May 19, 2009, that explained and extolled Christian doctrine:

> We are approaching the end of the Easter Season . . . the ascension of the Lord on Thursday of this week. Coming at the end of the forty days of Jesus Christ's resurrection appearances, and with the Feast of Pentecost ten days later. . . . The beauties of spring . . . are an expressive symbol of the new life of the risen Christ. The Holy Spirit was sent to the apostles at Pentecost so that they would be courageous witnesses of the Good News. . . . The Holy Spirit continues to be the inspiration and the source of strength and virtue. . . . And so we acknowledge the role of the Holy Spirit in our lives. . . .

J.A. 134a. The prayers advance religion by preaching the tenets of Christianity with government imprimatur. Greece bestows a privileged station to officiants, behind the Greece Seal, facing the audience, like the Board. The full weight of Greece backs these sectarian Christian messages.

Greece's clergy selection process also advances religion. This Court has specifically stated that the

government selecting clergy is divisive: "the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent." *Lee v. Weisman*, 505 U.S. at 587. Clergy selection is divisive precisely because it selects, and thereby advances, one religion over another. And avoiding "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Lemon*, 403 U.S. at 622. Greece argues that it has not advanced religion because selection of clergy is purportedly "neutral," but this is factually untrue: Christian clergy delivered 100% of Greece's prayers from 1999 through 2007. In the history of Greece's prayers, no religion other than Christianity was represented until just prior to litigation. However neutral the policy, its effects show an unconstitutional Christian bias in the selection process and "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Santa Fe*, 530 U.S. at 307 n.21 (citations omitted).

Second, by definition, proselytizing prayers violate *Marsh*'s sole constitutional safeguard. As Justice Kennedy has recognized, granting Christianity a privileged position alongside secular government constitutes proselytizing:

> Symbolic recognition or accommodation of religious faith may violate the [Establishment] clause in an extreme case. I doubt not, for example, that the Clause forbids a city to

> permit the permanent erection of a large Latin cross on the roof of city hall . . . because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.

Allegheny, 492 U.S. at 660-61 (Kennedy, J., dissenting) (citations omitted). It is inapposite that a Christian symbol at the seat of government is unconstitutional proselytizing, yet a government expression of worship to the god that symbol represents as its first order of official business passes constitutional muster.

Marsh could only be distinguishable from Justice Kennedy's example because there "government officials invoke[d] spiritual inspiration entirely for their own benefit without directing the religious message at the citizens they lead." *Lee v. Weisman*, 505 U.S. at 630 n.8 (Souter, J., concurring) (discussing *Marsh*). Before the prayer, a Greece employee rotates the podium and seal to face citizens, not the Board, then rotates it back after the prayer. The prayers, like Justice Kennedy's hypothetical cross, are directed at citizens.

Finally, the effect of the Greece prayers is substantially magnified because of Greece's proximity to its citizens: "The proximity of prayer to official government business can create an environment in which the government prefers – or appears to prefer – particular sects or creeds" in violation of "the clearest command of the Establishment Clause." *Joyner v.*

Forsyth County, N.C., 653 F.3d 341, 347 (4th Cir. 2011), *cert. denied*, 132 S.Ct. 1097 (2012).

The government, and the prayers, are much closer to citizens in the instant case than in *Marsh*. Participation is often required for citizens desiring local government action and "participation in local government is a cornerstone of American democracy," *F.E.R.C. v. Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring). But there is little citizen participation in a state legislature: "[l]egislators . . . may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect." *Marsh*, 463 U.S. at 796 n.2 (Brennan, J., concurring). Greece citizens are required to come before the board on important civic matters ranging from public comment to obtaining licenses or variances. Before citizens address the government, they must state their name and address. *See* Exhs. 701-807, 811-29. Outing oneself as a nonbeliever in a small community could ruin the business for which one is seeking a license. The effect of government prayers on citizens is far greater and far more injurious at the local level than at the state level as in *Marsh*.

Greece avoids the facts of this case, but the facts establish that Greece's prayers are government speech that advance religion and proselytize in violation of the Establishment Clause.

CONCLUSION

If *Marsh* is to have a legitimate safeguard and not wholly exempt a government religious practice from constitutional scrutiny, then the safeguard must be based on Establishment Clause principles. And, "[w]hether the key word is 'endorsement,' 'favoritism,' or 'promotion,'" or proselytize, advance, or disparage, "the essential principle remains the same." *Allegheny*, 492 U.S. at 593. The Second Circuit applied this principle in deciding that Greece's prayers were unconstitutional. This Court should affirm the Second Circuit's decision.

Better still, this Court should correct *Marsh*'s "blind veneration" of an incomplete and flawed history. This Court should follow its remarkable tradition of impartially applying legal principles to strike down longstanding historical violations. We ask that you "strik[e] down all official legislative invocations" and overturn *Marsh*. 463 U.S. at 818 (Brennan, J., dissenting). By ruling against legislative prayer this Court can strike a blow for the freedom of conscience of *all* citizens.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-696

IN THE
Supreme Court of the United States

TOWN OF GREECE,
Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF INDIANA, TEXAS, AND TWENTY-ONE ADDITIONAL STATES AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Texas, Alabama, Alaska, Arkansas, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nebraska, Ohio, Oklahoma, South Dakota, Tennessee, Utah, Virginia, and West Virginia respectfully submit this brief as *amici curiae* in support of the Petitioner. All fifty States follow, in some fashion, the longstanding American practice of opening each legislative session day with a prayer. The *amici* States have an interest in protecting these deeply rooted traditions and in avoiding complex Establishment Clause tests that would force officials either to parse the content of each prayer and purge them of any sectarian references or to abandon their legislative prayer practices altogether. The *amici* States urge the Court to re-affirm the central holding of *Marsh v. Chambers*, 463 U.S. 783, 792 (1983), that legislative prayers are permissible as "simply a tolerable acknowledgment of beliefs widely held among the people of this country," and to disclaim any role for the so-called endorsement test when it comes to analyzing legislative prayer practices. The Court should also consider using this case as an opportunity to clarify Establishment Clause doctrine more generally by requiring a showing of religious coercion as a touchstone for proving any type of unlawful religious establishment.

SUMMARY OF THE ARGUMENT

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court upheld the practice of legislative prayer based on its "unambiguous and unbroken history of more than 200 years"—a history that made legislative prayer "part of the fabric of our society." *Id.* at 792. *Marsh* seemed to remove legislative prayer from the wilderness of Establishment Clause jurisprudence, providing a clear constitutional license based upon history and tradition.

In recent years, however, lower courts have begun to dismiss *Marsh*'s straightforward historical analysis and instead subject particular prayer practices to the endorsement test derived from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring), and *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). *See, e.g., Galloway v. Town of Greece*, 681 F.3d 20, 30-33 (2d Cir. 2012); *Joyner v. Forsyth County*, 653 F.3d 341, 348-49 (4th Cir. 2011). *See also Hinrichs v. Bosma*, 440 F.3d 393, 398-402 (7th Cir. 2006) (denying the Indiana House Speaker's motion to stay an injunction against "sectarian" legislative prayers pending appeal and suggesting that the court would apply an endorsement test should a legislative prayer case reach the court on the merits).

Fact-intensive inquiries into the precise sectarian content of legislative prayers conflict with this Court's broad approval of legislative prayer in *Marsh*. Instead of leaving the determination of sectarian content to the theologians, courts applying the endorsement test require legislators to censor the prayers—*i.e.* "parse the content of a particular prayer," *Marsh*, 463 U.S. at 795—of private citizens who step forward to provide a public service.

At a minimum, it is important that this Court reaffirm *Marsh*'s historical analysis and prevent legislative prayer from being dragged into the confusion that prevails in so many other areas of Establishment Clause doctrine. But the Court can, and should, do more. This case provides an opportunity to bring clarity to the Establishment Clause doctrine. The Court should provide that clarity by adopting a single Establishment Clause test that is clear, workable, and faithful to the text and history of the First Amendment.

ARGUMENT

I. The Court Should Affirm *Marsh*'s Historical Analysis and Reject an Unworkable Endorsement Test for Legislative Prayer

The same rich history of legislative prayer that supported the Nebraska Unicameral's use of a paid legislative chaplain in *Marsh v. Chambers*, 463 U.S. 783 (1983), equally grounds the rotating chaplaincy

practices of the Town of Greece and many other state and local legislative bodies across the country. Like the Town, a substantial number of state legislative bodies have relied on *Marsh* to continue their historical practices of accommodating clergy of diverse religions and sects who offer distinctive invocations as legislative sessions are called to order. Abandoning *Marsh* in favor of some version of the endorsement test would not only upend these settled practices, but also require officials—at first legislative, but ultimately judicial—to parse theological content and thereby entangle government even more in prayer, with the only alternative being to abandon prayers altogether. The Establishment Clause does not require officials either to edit historically permissible religious expressions or scrub them from the public square.

A. *Marsh*'s historical analysis governs legislative prayers involving rotating chaplains and was not overturned or modified by *Allegheny*

In *Marsh*, the Court upheld the Nebraska Unicameral's use of a "chaplain who is chosen biennially by the Executive Board of the Legislative Council and paid out of public funds." *Marsh*, 463 U.S. at 784-85. The basis for this holding was legislative prayer's "unambiguous and unbroken history of more than 200 years"—a history that has

made such prayer "part of the fabric of our society." *Id.* at 792.

In particular, the Court observed that the First Congress authorized the appointment of paid chaplains three days before it reached a final agreement on the language of the Bill of Rights. *Id.* at 788. Thus, concluded the *Marsh* Court, "[c]learly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id.* The Court in *Marsh* also recounted how many state legislative bodies at the time of the Founding—both before and after ratification of the First Amendment—featured legislative prayer in some form. *Id.* at 787-90.

The historical-practice rationale should apply with equal force to the protocol at issue here, where volunteer clergy of *any* faith may offer a prayer before town council meetings. *Galloway v. Town of Greece*, 681 F.3d 20, 23 (2d Cir. 2012). The Town of Greece invites clergy from religious communities within the Town on a rotating basis, working through a periodically updated list of religious organizations published by the Greece Chamber of Commerce. *Id.* at 23-24. As a service to the Town and its council, each prayer-giver delivers an un-previewed, un-censored invocation. *Id.* at 23.

1. The Town's rotating-chaplaincy practice parallels the historical practices of Congress and other legislative bodies. The U.S. House of Representatives, for example, experimented with a rotating chaplaincy for several years in the mid-nineteenth century. *See* Jeremy G. Mallory, *"An Officer of the House Which Chooses Him, and Nothing More": How Should* Marsh v. Chambers *Apply to Rotating Chaplains?*, 73 U. Chi. L. Rev. 1421, 1446 n.149 (2006) (collecting sources to support the proposition that "the House's switch to a rotating chaplaincy lasted for six years, from the Thirty-fourth through the Thirty-sixth Congress").

In addition, many—perhaps a majority—of state legislative chambers have a long history of using a rotating chaplaincy. Based upon a chaplaincy program dating back more than 188 years, the Indiana House of Representatives begins each legislative session day with an invocation delivered by a volunteer chaplain. *See Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1105 (S.D. Ind. 2005). Likewise, the Indiana State Senate has used a rotating chaplaincy since at least 1887. The Journal of the Indiana Senate's 1887 session indicates that the Senate invited a variety of clergymen to open each legislative day with a prayer. S. J. 55, Reg. Sess. (Ind. 1887). During each of the eleven legislative days running from January 11, 1887, to January 22, 1887, for example, eleven different clergymen—from ten different churches—offered an opening prayer.

Id. at 77, 83, 107, 119, 127, 135, 184, 197, 210, 222, 240.

The New York State Assembly's use of a rotating chaplaincy dates back as far as 1831. The Assembly's journal for that year includes an adopted resolution that directs the chamber's clerk "to request the several clergymen of the city of Albany having charge of congregations, to attend the opening of this House each morning by prayer, in such order as may suit their convenience." H. J. 54, 1st Sess., at 8 (N.Y. 1831). The New York State Senate's 1845 journal records an analogous resolution: "[t]hat the Clerk be directed to invite the Clergymen of this city, having charge of congregations, to open the daily sittings of the Senate with prayer, in such order as may be most convenient to themselves." S. J. 68, 1st Sess., at 4 (N.Y. 1845).

Similarly, both chambers of Pennsylvania's state legislature have long used a rotating chaplaincy. The 1862 Journal of the Pennsylvania Senate notes a resolution providing for a rotating chaplaincy: "the clergymen of the city of Harrisburg are hereby invited to open the morning sessions of the Senate with prayer, in such manner or succession as they may arrange." S. J. 1862, 1st Sess., at 13 (Pa. 1862). Indeed, Pennsylvania's House of Representatives has at least once explicitly rejected the idea of a

"situated chaplaincy."[1] During the first few weeks of the highly contentious 1868 House session, the chamber rejected a resolution naming a particular clergyman the House Chaplain for the duration of the session and instead adopted a resolution virtually identical to the Pennsylvania Senate's policy: "the Clergy of Harrisburg be invited to open the sessions of the House each day with prayer." H. J. 1868, 1st Sess., at 40 (Pa. 1868).

Since at least 1861, Virginia has followed a virtually identical policy. The Virginia Senate Journal of 1861 notes that the chamber approved a resolution "[t]hat the ministers of the gospel officiating in the churches of this city . . . are hereby invited to open our sessions with prayer, and the President is requested to make such arrangement with said ministers as will insure the presence of some one of them at our daily sessions." S. J. 1861, Reg. Sess., at 26 (Va. 1861). That same year, Virginia's House of Delegates adopted a resolution requesting that the Speaker "invite the clergy of all

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[1] A situated chaplaincy refers to a legislative chamber appointing—whether to a paid position or to a volunteer post—an official chaplain for the duration of the legislative session, while a rotating chaplaincy refers to a legislative chamber inviting a series of different members of the clergy to offer prayers during or before each legislative day. *See* Jeremy G. Mallory, *"An Officer of the House Which Chooses Him, and Nothing More": How Should* Marsh v. Chambers *Apply to Rotating Chaplains?*, 73 U. Chi. L. Rev. 1421, 1426-27 (2006).

the religious denominations of this city to open the sessions of this house daily with prayer." H. J. 1861, Extra Sess., at 89 (Va. 1861) (provided by the Univ. of N.C. at Chapel Hill's digitization project *Documenting the American South*, at http://docsouth.unc.edu/imls/vadel61/vadel61.html). Additionally, over the course of the Virginia House's extra session that lasted from January 7 to April 4, 1861, fifteen different clergymen representing six different denominations prayed at the start of each legislative day. *Id.*

Finally, Maine's state legislative record also reveals that, in both chambers of its state legislature, a different minister led a prayer at the start of each legislative day. H. J. 68, Reg. Sess., at 5-71 (Me. 1897). The Maine Senate followed a virtually identical pattern. S. J. 68, Reg. Sess., at 1-75 (Me. 1897).

2. A rotating chaplaincy is even less prone to establishing a religion than the practice upheld in *Marsh*. With no single paid chaplain and no government censorship, it accommodates all religious viewpoints without supporting clergy with public funds. If anything, such a practice should put to rest any concerns about affiliating government too closely with a single religion.

Yet, the Second Circuit rejected the Town of Greece's rotating chaplaincy practice. Rather than ask whether rotating uncensored prayers at council

meetings fits within the parameters of *Marsh*, the court applied a different standard based on dictum from this Court's opinion in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). Specifically, the court below relied on a passage from *Allegheny* stating that the prayers at issue in *Marsh* did not have "the effect of affiliating the government with any one specific faith or belief . . . because the particular chaplain had 'removed all references to Christ.'" *Id.* at 603 (quoting *Marsh*, 463 U.S. at 793 n.14).

Allegheny did not overrule or modify *Marsh*; nor did the Court in *Marsh* cabin its review of Nebraska's legislative prayer practice to the short period of time during which the chaplain delivered prayers not mentioning Christ. Indeed, as the Court later noted in *Van Orden v. Perry*, 545 U.S. 677 (2005), the Nebraska chaplain "removed all references to Christ *the year after* the suit was filed." *Id.* at 688 n.8 (emphasis added). Thus, the Court in *Marsh* focused on the entirety of Nebraska's practice, which included the much more prevalent periods of unabashedly Christian prayers. *Marsh*, 463 U.S. at 793 & n.14. The Court stated that "there is no indication that the prayer opportunity *has been exploited*[.]" *Id.* at 794 (emphasis added). In a case similar to this one, Judge O'Scannlain recently observed for the Ninth Circuit that the verb tense matters here, as it "denot[es] 'a time in the indefinite past' or 'a past action that comes up to and touches

the present.'" *Rubin v. City of Lancaster*, 710 F.3d 1087, 1093 (9th Cir. 2013) (quoting The Chicago Manual of Style 237 (16th ed. 2010)). This, in turn, suggests the Court was considering all of the prayers made before the Nebraska legislature, not merely the "nonsectarian" ones.

Furthermore, the Court based its decision on the long-standing history and tradition of legislative prayer in the United States, a tradition that involves almost exclusively Christian prayers. *Marsh*, 463 U.S. at 786-92. Thus, concluded Judge O'Scannlain in *Rubin*, "[a]s written, the [*Marsh*] opinion leaves the impression that *none* of Palmer's controversial prayers, at least viewed cumulatively, crossed the [Establishment Clause] line." *Rubin*, 710 F.3d at 1093. Indeed, as Judge O'Scannlain observed, the dissenting justices in *Marsh* interpreted the majority opinion as approving *all* prayers, including those specifically mentioning Christ. *Id.* Justice Brennan, for example, argued that the "controversy" surrounding the chaplain's "Christological references" demonstrated a threat of "excessive 'entanglement' [with religion that] might arise out of 'the divisive political potential' of a state statute or program." *Marsh*, 463 U.S. at 799-800 & n.9 (Brennan, J., dissenting) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614-22 (1971)). Justice Stevens, also dissenting, criticized the majority for failing to scrutinize the Nebraska chaplain's overtly Christian prayers, stating, "[t]he Court declines to

'embark on a sensitive evaluation or to parse the content of a particular prayer.' Perhaps it does so because it would be unable to explain away the clearly sectarian content of some of the prayers given by Nebraska's chaplain." *Id.* at 823 (Stevens, J., dissenting) (citation omitted).

Furthermore, the decision in *Allegheny*—which did not even review the permissibility of legislative prayers—does not modify *Marsh*'s general approval of legislative prayers (including those invoking Christ). *Allegheny* states only that prayers not invoking Christ would not affiliate the government with religion. *Allegheny*, 492 U.S. at 603. But that unremarkable observation hardly establishes the inverse proposition that, while permissible for more than two hundred years, any Christ-centered legislative prayer must now be declared unconstitutional because it affiliates the government with religion.

B. The endorsement test is especially inapt where private citizens offer prayers in service to their elected legislative bodies

Applying the *Allegheny* endorsement test to the Town of Greece's prayer practices would force government officials and courts to "parse" and ultimately censor invocations crafted by private citizens in service to a local legislative body. That approach violates the venerable American tradition of accommodating religious practices (even in the

context of government service) and is ultimately self-defeating.

1. Without substantial discussion of the matter, the Court in *Marsh* treated the prayer of a "State-employed clergyman" as government speech. *See Marsh*, 463 U.S. at 786. The circuits have in turn treated *all* legislative prayers as government speech, even when offered by a private citizen. *See, e.g., Turner v. City Council of Fredericksburg*, 534 F.3d 352, 354-55 (4th Cir. 2008) (treating prayers as government speech because of their focus on government business at the beginning of meetings); *Pelphrey v. Cobb County*, 547 F.3d 1263, 1266 (11th Cir. 2008) (considering a rotating chaplaincy as government speech); *Joyner v. Forsyth County*, 653 F.3d 341, 343-44 (4th Cir. 2011) (considering a legislative prayer "practice" and eventual "policy" as government speech).

The Court should reject the assumption that the content of private citizens' prayers before legislative assemblies is attributable exclusively to the government. Such prayers, rather, are expressions of private belief made in service to an elected body of citizens. Those present may participate or not, but each citizen's mode of rendering this particular service to a governmental body may rightfully be accommodated.

In terms of government-operated fora, the floor of a legislative body is perhaps *sui generis*. A

legislative entity is not typically an open forum, where all may speak on any subject without fear of viewpoint or even content discrimination. *Cf. Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). It is not even a limited public forum (such as a university meeting hall or a city-owned theater), where government may restrict the topics, but not the individuals who speak or the viewpoints discussed. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001).

Rather, no one—other than (perhaps) an elected legislator—has a right to speak on the floor of an elected legislative body. In the American tradition, each legislative assembly chooses officers who decide who may speak on which subjects at any given time. *See, e.g.*, United States House of Representatives Rules I, XVII, 113th Cong., 1st Sess. (2013) (requiring recognition from the Speaker before speaking). Protection of legislators' floor speech rights is largely a matter for Speech and Debate Clauses (and electoral accountability). *See* Steven N. Sherr, *Freedom and Federalism: The First Amendment's Protection of Legislative Voting*, 101 Yale L.J. 233, 234 (1991) (acknowledging that legislative independence primarily has rested on the "Speech or Debate Clause, similar state constitutional provisions, and common law notions of legislative immunity"). In fact, the extent to which legislators have judicially enforceable First Amendment free speech rights on the chamber floor

is far from clear. *See, e.g., Parker v. Merlino*, 646 F.2d 848, 854-55 (3d Cir. 1981) (upholding a New Jersey Senate no-debate rule as necessary for "allowing the legislature efficiently and effectively to perform its main function of making collective decisions on proposals before it").

Yet unlike, for example, mottos on standard-issue license plates, symbols on government seals, and state house Ten Commandments displays, statements made on the floor of an elected legislative body do not generally constitute speech by "the government." In a very real sense, even legislators retain their identities as individual citizens when they speak in support of a bill or resolution, regardless that they do so officially as elected representatives. Citizen speech is even more removed from official sponsorship. It occurs only if invited, to be sure, but in no way does it constitute the speech of the body itself. *Cf.* United States House of Representatives, Office of Art & Archives, *Historical Highlights: General Douglas MacArthur Delivered His Farewell Address to a Joint Meeting of Congress*, http://history.house.gov/HistoricalHighlight/Detail/36088 (last visited July 30, 2013). In short, a legislative body in a republic has the particular functional need both to invite citizen speech (by elected representatives and others) and to restrict who speaks on which topics. So, while invited prayer fulfills a legislative function

generally, the specific words of each prayer belong to the speaker and those who wish to participate.

What is more, the Establishment Clause generally permits government accommodation of individual religious practices amid legitimate service to the government. Religious accommodation in general is a venerable American custom. The Court itself formerly *required* reasonable religious accommodation as a matter of free exercise. *See Sherbert v. Verner*, 374 U.S. 398, 403-09 (1963); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716-20 (1981). It has since retreated from that rule, *see Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 883-85 (1990), but still acknowledges the general permissibility of religious accommodation, *see id.* at 890. *See also Walz v. Tax Comm'n of New York*, 397 U.S. 664, 669 (1970) ("[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.").

Accordingly, the Federal Government may exempt religious organizations from Title VII's prohibition on religious discrimination in employment, *see Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329-30 (1987), and require States accepting federal correctional program grants to make reasonable accommodations of prisoners' religious

practices. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (deeming the Religious Land Use and Institutionalized Persons Act "a permissible legislative accommodation of religion that is not barred by the Establishment Clause").

The accommodation principle extends to contexts where religious leaders use their faiths and expertise to render government service, such as through chaplaincy programs. *See, e.g.*, *Katcoff v. Marsh*, 755 F.2d 223, 233 (2d Cir. 1985) (upholding the Army chaplaincy program against an Establishment Clause challenge and warning that the Establishment Clause must be "interpreted to accommodate other equally valid provisions of the Constitution, including the Free Exercise Clause, when they are implicated"); *Johnson-Bey v. Lane*, 863 F.2d 1308, 1312 (7th Cir. 1988) (confirming that "[p]risons are entitled to employ chaplains"); *Theriault v. A Religious Office in the Structure of the Gov't Requiring a Religious Test as a Qualification*, 895 F.2d 104, 107 (2d Cir. 1990) (same); *Carter v. Broadlawns Med. Ctr.*, 857 F.2d 448, 457 (8th Cir. 1988) (upholding a county hospital's employment of a chaplain as "a permissible accommodation of at least some patients' free exercise rights").

The longstanding tradition of legislative prayer fits this model, particularly when carried out through the voices of private citizens. Citizens offer prayers in service to an elected assembly, and in so

doing may receive accommodation of their individual beliefs without implicating the Establishment Clause. Sanitizing legislative prayers of "sectarian" references, on the other hand, deprives adherents of the chance to undertake religious exercise based on core beliefs, to the point where some otherwise willing citizens may forego offering legislative prayer entirely if they cannot do so according to their consciences. Just as military chaplains draw on specific "sectarian" tenets to minister effectively, so too do citizens volunteering for legislative prayer require use of their consciences once inside the chamber door.

In short, the history of legislative prayer, the traditional and structural necessity of legislative floor control, and the American culture of religious accommodation combine to create a system where legislative assemblies may, without even remotely threatening an establishment of religion, invite citizens to offer uncensored prayers at the beginning of each legislative session day.

2. The endorsement test, in contrast, is not designed to accommodate private religious conduct in service to the government. To the contrary, enforcing an endorsement test and a "non-sectarian" mandate calls to mind government-sanctioned censorship of religious expression. For example, in *Turner v. City Council of Fredericksburg*, 534 F.3d 352, 356 (4th Cir. 2008), the court approved a city

council's exclusion of a minister who wished to give a prayer in the name of Jesus Christ.

It is an insult to individual expression and religious exercise to permit prayers only by those who agree to pray in the government-ordered fashion. In fact, even a preeminent scholar who *opposes* legislative prayer acknowledges that policing invocations in the name of the Establishment Clause will result in "a disturbing sort of censorship," something he considers "an unsavory task." *See* Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 Minn. L. Rev. 972, 1013-15 (2010). Professor Lund even goes so far as to say that "the exercise of this power [to censor prayer] is deeply troubling [because t]hose who pray in nondenominational terms can pray as they do normally[, b]ut those who pray in the name of Jesus are permanently excluded from the prayer opportunity, precisely because of their religious commitments." *Id.* at 1019. The ability of a community's clergy to offer an invocation opening a legislative session is an honor that many would desire, but an endorsement test requiring officials to scrub prayers of particular religious references (but not others) would exclude many whose faiths require them to mention specific deities or beliefs in their prayers.

In this way, an endorsement test is essentially self-defeating. A mandate for "non-sectarian"

prayers in effect endorses a mode of belief. That is, what a court decides is "nonsectarian" may well appear very sectarian from a different perspective. *See* Robert J. Delahunty, *"Varied Carols": Legislative Prayer in a Pluralist Polity*, 40 Creighton L. Rev. 517, 540-41 (2007) ("The quest to find some 'common denominator' prayer language will characteristically depend on overlooking two elementary but essential points: first, the fundamental difference between monotheistic religions . . . and non-theistic religions . . . and second, the existence of ways of understanding and characterizing 'God' that strikingly distinguish the main monotheistic religions from each other—and, indeed, that distinguish believers even within each of the major monotheistic traditions.").

Any religious reference, no matter how banal it may appear to jurists, carries with it religious connotations not agreed upon by all. A court of law is not equipped to determine what individual believers find to be "sectarian," and a judicial attempt to establish a "non-sectarian" norm risks creating a "civil religion" of its own. *Cf. Lee v. Weisman*, 505 U.S. 577, 589 (1992) ("But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself."). Instead, the only practical solution is to embrace the plurality of faiths in America and "weave our tradition of religious liberty together

with our remarkable religious diversity . . . that recognizes our different faiths but that does not unconstitutionally prefer, or even appear to prefer, any of them." Delahunty, *supra*, at 561.

3. Indiana's experience in *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103 (S.D. Ind. 2005), *stay of injunction pending appeal denied*, 440 F.3d 393 (7th Cir. 2006), *injunction vacated on standing grounds sub nom. Hinrichs v. Speaker of House of Representatives of Ind. Gen. Assem.*, 506 F.3d 584 (7th Cir. 2007), illustrates the difficulties inherent in applying the endorsement test to legislative prayer. At the time of that lawsuit, the Indiana House had been opening its sessions with an invocation for 188 years, *id.* at 1105, and continues to do so today. At the discretion of the Speaker, the House invites either a member or outside religious clergy to deliver a prayer after each daily legislative session is called to order. *Id.* The Speaker invites outside clergy based on members' nominations and supplies no guidance as to content other than to "strive for an ecumenical prayer." *Id.*

The district court found "sectarian" prayers—*i.e.* prayers containing overt references to Christianity—that resulted from this process to be troubling and declared them illegal. Rejecting the *Marsh* historical analysis, the court instead applied the endorsement test, which, in its view, forbids "expressly and consistently sectarian" prayers that "express the

faith of a particular religion[.]" *Id.* at 1121-22, 1131. In attempting to craft its injunction, however, the court appeared to only ban references to a Christian deity, but not references to the deities of other sectarian religions. *See Hinrichs v. Bosma*, No. 1:05-cv-0813, 2005 WL 3544300, at *7 (S.D. Ind. Dec. 28, 2005) (banning proclamations that claim "Jesus of Nazareth was the Christ, the Messiah, the Son of God, or the Savior, or that he was resurrected, or that he will return on Judgment Day or is otherwise divine" but permitting references to "the Arabic Allah" as but a foreign translation of "God").

Thus, in attempting to rid the Indiana House of "sectarian" prayers, the court in effect banned only overtly Christian prayers. And while the court acknowledged that "a practice of sectarian prayer favoring *any* particular religion violates the Establishment Clause[, including] sectarian Jewish or Muslim prayers," *Hinrichs*, 400 F. Supp. 2d at 1126, applying that injunction to preclude overt prayer references to Allah, Vishnu, Krishna, or other deities would only have underscored government endorsement of what remained permissible: general references to God, or no references to any deity at all. In this circumstance, where the religious reference occurs in the context of real-time religious exercise, and not simply as part of a static civic symbol (such as a seal or motto), the enforced preference for a particular religious exercise would be unmistakable.

II. The American People Deserve an Establishment Clause Jurisprudence That Is Clear, Workable, and Faithful to the Text and History of the First Amendment

Since 1791, the Constitution has compelled that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Despite the clarity of these words, modern Establishment Clause jurisprudence is anything but clear. As Justice Thomas recently noted, the "jurisprudence provides no principled basis by which a lower court could discern whether *Lemon*/endorsement, or some other test, should apply in Establishment Clause cases." *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 14 (2011) (Thomas, J., dissenting from denial of certiorari).

The Second Circuit's decision striking down a town's traditional practice of opening board meetings with a prayer demonstrates once again the dire need for a new Establishment Clause jurisprudence. Rather than follow straight-forward, binding precedent from *Marsh v. Chambers*, 463 U.S. 783 (1983), the Second Circuit relied on: (1) dictum from *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), *see Galloway v. Town of Greece*, 681 F.3d 20, 27-28 (2d Cir. 2012); and (2) "the exercise of [its own] legal judgment" in lieu of any "precise criteria" or

test, *id.* at 30, to justify its holding that the Town's practice "must be viewed as an endorsement of a particular religious viewpoint," *id.*

Abandoning *Marsh* and adapting the *Lynch/Allegheny* endorsement test for legislative prayer could only ensure muddled, fact-intensive theological inquiries with no certain results for legislative bodies, the public, or the courts. The endorsement test has already led a federal court to declare legislative prayers invoking "Jesus" but not "Allah" inherently and impermissibly "sectarian." *Hinrichs, v. Bosma*, No. 1:05-cv-0813, 2005 WL 3544300, at *7 (S.D. Ind. Dec. 28, 2005). Such counterintuitive results and the general profusion of competing Establishment Clause standards should discourage replacing *Marsh* with the endorsement test.

Yet while *Marsh* provides a clear answer in this case, *see supra* Part I; *see also* Pet. Br. at 16-22, 27-40, it ultimately does not resolve the persistent Establishment Clause confusion. When circuit courts feel empowered by the uncertainty in the Court's Establishment Clause doctrine to strike down the very practice explicitly reviewed and upheld in *Marsh*, a fundamental problem that only this Court can solve is squarely presented: the Establishment Clause jurisprudence remains in "hopeless disarray," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J.,

concurring in the judgment), and it is in need of "[s]ubstantial revision," *Allegheny*, 492 U.S. at 656 (Kennedy, J., concurring in the judgment in part and dissenting in part); *see also Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) ("Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test."); *cf. McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 859 n.10 (2005) (noting that "[a]t least since *Everson v. Board of Ed. of Ewing*, 330 U.S. 1 (1947), it has been clear that Establishment Clause doctrine lacks the comfort of categorical absolutes").

Accordingly, the Court should take this opportunity to provide long-overdue clarity to this area.

A. Modern Establishment Clause jurisprudence provides little guidance for governments and their citizens

One would be hard pressed to find an area of the law plagued with a greater uncertainty than this Court's Establishment Clause doctrine. When the Court has employed a new Establishment Clause test, the Court has added it to the list of options rather than offered it as a permanent replacement. *See, e.g., Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion) ("Whatever may be the fate

of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with [a] passive monument . . . ."). Thus, (1) the *Lemon* test; (2) the *Lemon*/endorsement test, *see, e.g.*, *Allegheny*, 492 U.S. at 592-94 (On occasion, the Court has modified *Lemon*'s primary-effect prong by asking instead whether a "reasonable observer" would view the challenged conduct as an "endorsement" of religion.); (3) the coercion test, *see Lee v. Weisman*, 505 U.S. 577 (1992); and (4) the *Van Orden* legal-judgment test, *see* 545 U.S. at 690-92 (plurality opinion); *id.* at 700, 703-04 (Breyer, J., concurring in the judgment), seemingly remain options for courts reviewing Establishment Clause challenges. Indeed, according to one account, Members of the Court have advocated *ten* different Establishment Clause standards in recent years. Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. Pa. J. Const. L. 725, 725 (2006); *see also id.* at 728-64.

The *Lemon* test, in particular, has been treated inconsistently—even when it is purportedly shelved for another test. Sometimes the Court ignores it completely, *e.g. Marsh*, other times it has been described as "useful" but non-binding, *e.g. Lynch v. Donnelly*, 465 U.S. 668, 679 (1984); *Hunt v. McNair*, 413 U.S. 734, 741 (1973). Perhaps most perplexingly, on the same day that the Court upheld Texas's Ten Commandments monument in *Van Orden*, the Court used *Lemon*/endorsement to

invalidate a different Ten Commandments display. *See McCreary County*, 545 U.S. at 859-66.

Given these inconsistencies, it is unsurprising that a majority of the current Justices have questioned the continued use of the *Lemon*/endorsement Test. *See, e.g., Utah Highway Patrol Ass'n*, 132 S. Ct. at 17 (Thomas, J., dissenting from denial of certiorari) (agreeing with the assessment that "the endorsement test amounted to unguided examination of marginalia using little more than intuition") (internal quotation marks omitted); *Salazar v. Buono*, 130 S. Ct. 1803, 1818-20 (2010) (plurality opinion of Kennedy, J., joined in full by Roberts, C.J., and in part by Alito, J.) (criticizing the workability of the endorsement test); *id.* at 1824 (Alito, J., concurring in part and concurring in the judgment); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768 n.3 (1995) (plurality opinion of Scalia, J.) (stating that the endorsement test "supplies no standard whatsoever."); *Allegheny*, 492 U.S. at 669) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("[T]he endorsement test is flawed in its fundamentals and unworkable in practice."); *see also McCreary County*, 545 U.S. at 890 (Scalia, J., dissenting) (noting that "a majority of the Justices on the current Court . . . have, in separate opinions, repudiated the brain-spun '*Lemon* test'").

B. The lack of clarity in Establishment Clause jurisprudence continues to have profound consequences

The current state of Establishment Clause jurisprudence has at least two significant consequences for government entities: (1) there can be little certainty how courts will treat a given state action or practice (the conflicting cases in the wake of *Van Orden* and *McCreary County* demonstrate one example) and (2) governments increasingly are put in situations where, no matter what action they take, they will be forced into costly litigation.

1. The confusion among lower courts has been especially pronounced following the Court's decisions in *Van Orden* and *McCreary County*. *E.g.*, *Am. Civil Liberties Union of Ky. v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005) (noting that after these two decisions, "we remain in Establishment Clause purgatory"); *see also Skoros v. City of New York*, 437 F.3d 1, 13 (2d Cir. 2006) ("[W]e confront the challenge of frequently splintered Supreme Court decisions" and justices who "have rarely agreed—in either analysis or outcome—in distinguishing the permissible from the impermissible . . . ."). Some courts have continued to follow *Lemon*/endorsement in display cases, *e.g.*, *Am. Civil Liberties Union of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 431 (6th Cir. 2011), including in a case involving a Ten Commandments monument similar to the display

upheld in *Van Orden*, *Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784, 796-97 (10th Cir. 2009). Other courts have followed *Van Orden*, *e.g.*, *Am. Civil Liberties Union Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 778 & n.8 (8th Cir. 2005) (en banc), including in a case that did not involve a religious display, *Myers v. Loudoun County Pub. Sch.*, 418 F.3d 395, 402 (4th Cir. 2005). And still other courts have adopted new variations on the *Lemon*/endorsement analysis. *E.g.*, *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840 (7th Cir. 2012) (en banc) (ignoring the undisputed secular purposes of a school district and attributing to the government private religious expression).

As Chief Judge Easterbrook noted in his dissent in *Elmbrook School District*, the lack of clarity in current Establishment Clause doctrine makes it "easy for judges to disagree about its application." 687 F.3d at 869 (Easterbrook, C.J., dissenting); *see also id.* ("If the current establishment-clause doctrine had been announced by Congress or an administrative agency, the Supreme Court would declare it unconstitutionally vague.") (citation omitted). This observation echoed Justice Thomas's recent acknowledgment that "it is the very flexibility of this Court's Establishment Clause precedent that leaves it incapable of consistent application." *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 17 (2011) (Thomas, J., dissenting from denial of certiorari) (internal quotations omitted). State and

local governments must therefore continue to make decisions regarding displays and conduct touching on religion with no meaningful way to know how the courts will judge their actions.

2. The uncertainty in Establishment Clause doctrine poses additional problems in scenarios involving the interplay between the religion clauses. Governments attempting to honor the Free Exercise rights of their citizens are frequently sued by those who wish to use the Establishment Clause to eliminate all things religious from the public square. *E.g.*, *Schultz v. Medina Valley Indep. Sch. Dist.*, No. 11-50486 (5th Cir. June 3, 2011) (per curium order dissolving a district court's temporary restraining order and preliminary injunction requiring a school district to instruct student speakers that they may not include prayers as a part of their graduation speech). On the other hand, governments that attempt to avoid those lawsuits by preventing the inclusion of religious elements get sued by those seeking the protections of the Free Exercise Clause. *E.g.*, *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526 (356th Jud. Dist., Hardin County May 8, 2013) (summary judgment order in a case involving high school cheerleaders' decision to include religious messages on banners displayed at football games). Governments are thus increasingly being put in situations where, regardless which decision they make, costly litigation follows. A clear, workable Establishment Clause doctrine would

enable governments to make informed decisions when confronted by these issues. *See* Pet. Br. at 48-50.

C. A coercion-based test would better reflect the text and history of the Establishment Clause

The Constitution's religion clauses have long been understood to permit government to acknowledge the religions and religious practices of the American people. The Court has recognized that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Justice Brennan cautioned that "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring). But the development of Establishment Clause doctrine (dating back at least to *Everson*) that has resulted in an unsustainable lack of "categorical absolutes," *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 859 n.10 (2005), has also divorced the doctrine from the text and history of the First Amendment.

As Professor Philip Hamburger has explained, "[s]eparation of church and state is an attractively simple metaphor. . . . however, it is an oversimplification [that fails to] appreciate the more

measured positions advanced by eighteenth-century evangelical dissenters." Philip Hamburger, *Separation of Church and State* 486 (2002). This short-handed attempt to describe the First Amendment (tracing its origins to Thomas Jefferson's letter of 1802 to the Danbury Baptist Association, *id.* at 1, 481) misses the critical "distinction between the separation of church and state and the constitutional freedom from a religious establishment," *id.* at 479-80. Although this distinction may be lost on (or perhaps purposefully ignored by) those who today wish to eradicate from public life all things touching on the religious, the "difference . . . was of profound importance to earlier Americans," *id.* at 480; *see also generally id.* at 101-07.

The First Amendment's religion clauses followed from the desire to protect free exercise of religion and to permit government legislation protecting that exercise, so long as it would not legislate an establishment. *Id.* at 107; *see also id.* at 101, 105-06. Professor Philip Kurland observed that:

> [c]onsidered against the background of American history in 1789, the Founders' general purpose is not in serious doubt. The government was not to determine how any individual could worship God; nor could it compel an individual, through taxation or otherwise, to support a religious observance by

> an individual, whether it was the taxpayer's own religion or someone else's. If the Founders' generation truly sought freedom for religious beliefs, however, I find no evidence that they were equally concerned with freedom for irreligion. Quite to the contrary, they sought to protect man's relation to his god.

Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 856 (1987). The Court recognized the free-exercise rationale underlying the Establishment Clause in *Cantwell v. Connecticut*, explaining that:

> [t]he constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,-freedom to believe and freedom to act.

310 U.S. 296, 303 (1940).

During the debates in the First Congress, James Madison (the principal draftsman) explained that he "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce

the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 Annals of Cong. 730 (Aug. 15, 1789). Professor Michael McConnell thus observed "[i]s compulsion an element of an establishment clause violation? If Madison's explanations to the First Congress are any guide, compulsion is not just an element, it is the essence of an establishment." Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933, 937 (1986). Many of the Court's earlier Establishment Clause cases likewise focused on an analysis of the presence or absence of religious compulsion. *See, e.g.*, *McGowan v. Maryland*, 366 U.S. 420, 451-52 (1961); *Zorach*, 343 U.S. at 311-12, 314; *McCollum v. Bd. of Educ.*, 333 U.S. 203, 209-10, 212 (1948); *Cantwell*, 310 U.S. at 303.

Amici States offer these brief observations mindful of the warning against merely "'picking and choosing statements and events favorable to [one's] cause,'" a warning that has particular force in this area of law. McConnell, *supra*, at 933 (quoting Kurland, *supra*, at 842). The States ask only that, in revisiting Establishment Clause doctrine, the Court consider the historical context in which the religion clauses were proposed and particular text was debated, passed by Congress, and then ratified by the States.

***

As Justice Goldberg first explained:

> [t]he First Amendment does not prohibit practices by which any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact.

Abington, 374 U.S. at 308 (Goldberg, J., concurring). Likewise, requiring the government "to purge from the public sphere all that in any way partakes of the religious," would "promote the kind of social conflict the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment).

Yet that is precisely the effect of the Second Circuit's decision in this case. And it is the effect of numerous circuit court decisions, *e.g.*, *Elmbrook Sch. Dist.*, 687 F.3d at 840 (holding unconstitutional conducting high school graduations in a nondenominational church's sanctuary); *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011) (holding unconstitutional the inclusion of a large cross within a veterans' memorial), that were made possible in large part by an Establishment Clause jurisprudence that "either in appearance or in fact" turns on nothing more than "judicial predilections."

Van Orden, 545 U.S. at 697 (Thomas, J., concurring). Because "[t]he outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges," *id.*, at 697 (Thomas, J., concurring), the Court should replace the myriad of Establishment Clause standards with a single coercion-based test that is clear, easily applied by courts and litigants, and faithful to the text and history of the First Amendment.

CONCLUSION

The decision below should be reversed.

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TOWN OF GREECE,

Petitioner,

v.

GALLOWAY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE JEWISH SOCIAL POLICY ACTION NETWORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS*[1]

The Jewish Social Policy Action Network ("JSPAN") is a membership organization of American Jews dedicated to protecting the constitutional liberties and civil rights of Jews, other minorities, and the weak in our society. For most of the last two thousand years, Jews lived in countries in which religion and state were one. In Europe, especially, Jews and minority Christian faith communities faced discrimination, persecution, expulsion or worse. Those who emigrated to America in the nineteenth and twentieth centuries found that here one could be both a Jew and an American, a Catholic and an American, even an atheist and an American. JSPAN believes that the gift of church-state separation bestowed on us by the Founding Generation is essential to all our fundamental freedoms and that therefore great care must be taken that there be no erosion of the separation of church and state principles embodied in the Establishment Clause.

JSPAN's interest in this case stems directly from the experience of its members, many of whom have lived at times in small towns or other communities where there were few other Jews. They have been subjected personally to coercive pressures to conform or stifle themselves when local governments have begun their proceedings with prayer, often prayer with a distinctly Christian message, but almost always with a message that is offensive to nonbelievers.

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1. A letter of consent from each of the parties has been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

JSPAN's members have also witnessed the hostility of local communities when a Jewish family objected to being proselytized by legislative prayer. Most of these cases never get the notoriety of Samantha Dobrich, whose family had to flee their home in predominantly Christian Georgetown, Delaware, based on an outpouring of hatred, after her parents objected to a graduation prayer. Their offense against community norms was in approaching the Indian River School Board and asking it to consider more generic, less exclusionary prayers rather than one in which the local minister proclaimed that Jesus was the only way to the truth. *See* Neela Banerjee, *Families Challenging Religious Influence in Delaware Schools*, New York Times, July 29, 2006.

As if they were entering a religiously-gated community, American Jews have felt hostility when they objected to governmental obeisance of the community's predominant faith. Such experiences have been well documented in sociological literature since the 1950's. *See, e.g.*, Eugene J. Lipman & Albert Vorspan, *A Tale of Ten Cities—The Triple Ghetto in American Religious Life*, 231-52 (1962 ed.). But they are not unique to Jews and are well documented in the stories of those who sought to be free from government coercion in matters of religion. *See, e.g.*, Sydney E. Ahlstrom, *A Religious History of the American People* 926-29, 954 (1972); Wayne R. Swanson, *The Christ Child Goes to Court* 20-21 (1990); and Robert S. Alley, *Without a Prayer: Religious Expression in Public Schools* 84-89, 96, 107-08 (1996); *see also* Denyse Clark, *Parrot's Death Latest Threat To Woman In Prayer Case*, The Herald (Rock Hill, S.C.), Aug. 17, 2004 at 1A, available at 2004 WL 89767 (describing the repeated harassment and death threats directed to the plaintiff in *Wynne v.*

Town of Great Falls, 376 F.3d 292 (4th Cir. 2004), after she sued to enjoin her town council from opening its meetings with sectarian prayers).[2]

SUMMARY OF ARGUMENT

Legislative prayer, particularly by local government bodies, coerces members of religious minorities to participate in exercises of the dominant denomination. Allowing a town council to begin its meeting by invoking Jesus Christ's guidance eviscerates the First Amendment's guarantee for the members of religious minorities that come before that council for decisions on their rights. Justice Brennan recognized this evil in his dissent in *Marsh v. Chambers*, 462 U.S. 783 (1983). The Establishment Clause embodies the principles of separation and neutrality toward religion; *Marsh* ignored these and should thus be overturned.

Even if the Court declines to overrule *Marsh*, it should not extend *Marsh*'s holding to apply to prayer before local government bodies. Although America as

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2. *Amicus* has first-hand experience as its Church/State Policy Center includes several attorneys who have represented parties in Establishment Clause cases, including the attorney who drafted the original complaint resulting in this Court's decision in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), and who was personally threatened for his involvement in the case. The Schempp family received threatening letters, some filled with excrement, and others inviting them to "move to a Heathen country." Stephen D. Solomon, *Ellery's Protest* 206-07 (2007). In addition, the children of one of the plaintiffs in that case were beaten on their way home from school, and their house was firebombed. Alley, *Without a Prayer*, *supra*, at 98.

a whole is religiously diverse, many local communities are homogenous, dominated by a single denomination. Legislative prayers in such communities often turn sectarian and coerce members of religious minorities to participate or at least to remain silent, lest they face virulent (and sometimes violent) backlash.

This Court should draw on the wisdom of our country's founders who recognized that within small communities there exists a great risk that the majority will be able to oppress a minority. *Marsh* should be limited so that local governments do not become a tool for coercing religious minorities.

ARGUMENT

I. *Marsh v. Chambers* was wrongly decided and should be overruled.

The Court erred in *Marsh* when it upheld the Nebraska State Legislature's practice of employing a chaplain who opened every legislative session with prayer. That decision was contrary to Establishment Clause doctrine and its underlying purposes, and it has been undermined by subsequent Supreme Court decisions.

Justice Brennan noted in his *Marsh* dissent, "The principles of 'separation' and 'neutrality' implicit in the Establishment Clause" serve several purposes: guaranteeing "the individual right to conscience,'" preventing the state from "interfering in the essential autonomy of religious life,'" preventing "the trivialization and degradation of religion by too close an attachment" to

government; and assuring that "essentially religious issues, precisely because of their importance and sensitivity, not become the occasion for battle in the political arena." 462 U.S. at 803-05. Noted Catholic priest and theologian John Courtney Murray, S.J., agrees: "religion itself . . . has been benefited by our free institutions, by the maintenance, even in exaggerated form, of the distinction between church and state." Murray, *We Hold These Truths* 83 (2005 ed.).

Marsh ignored these important doctrinal principles by carving a narrow portal in the wall of separation for state legislative prayer. Previously, the Court had recognized that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Similarly, the Court had characterized the neutrality implicit in the Establishment Clause as a bulwark against the historical tendency for "powerful sects or groups [to] bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963). *Marsh* disregarded these considerations; legislative prayer was allowed to "intrude[] on the right to conscience by forcing some legislators to participate in a 'prayer opportunity' with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to participate." *Marsh*, 463 U.S. at 808 (Brennan, J., dissenting).

More recent cases have undermined *Marsh*. *See, e.g.*, *Cty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573 (1989). The Court in *Allegheny County* limited *Marsh*'s reasoning to the congressional authorization of legislative prayer existing at the time it produced the Bill of Rights. *Id.* at 602. Later, the Court distinguished between the "influence and force" of a public school graduation and the opening of a session of a state legislature. *Lee v. Weisman*, 505 U.S. 577, 597 (1992). Prayer during the former was not sanctioned by *Marsh* because "the student was left with no alternative but to submit." *Id.* The *Allegheny County* majority also noted that even legislative prayer's "unique history" cannot "justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief. The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.'" *Id.* at 603 (citations omitted).

But drawing an arbitrary line between "sectarian" and "nonsectarian" prayers is unworkable. Although references to "Christ" are certainly affiliated with one specific faith, courts are left to struggle over whether other references—God the Father, Messiah, or Lord—are sectarian. *Engel*, which struck down a nonsectarian prayer that simply referenced "Almighty God," teaches that efforts to develop even vaguely worded, milquetoast, nondenominational prayers can run afoul of the Establishment Clause. 370 U.S. at 422. And the Court similarly held in *Lee* that the State could not sponsor "generically theistic prayers where it could not sponsor nonsectarian ones" in the public school setting. 505 U.S. at 610. Rather than treating all legislative prayer as *sui*

generis, the Court should overturn *Marsh*, using the same test as with any other alleged Establishment Clause violation.

II. Even if the Court declines to overrule *Marsh*, it should not extend *Marsh*'s holding to include prayer at the local and county level.

A. Although America is religiously diverse, a large number of local communities are dominated by a particular denomination.

Scholars have noted that the United States, as a whole, is arguably the single most religiously diverse society in the world. *See* Diana Eck, *A New Religious America: How A "Christian Country" Has Become The World's Most Religiously Diverse Nation* (2001). But sociological studies of religious adherence in the United States belie any suggestion that America has become more religiously integrated. *See* Barry A. Kosmin & Ariela Keysar, *Religion in a Free Market* 124 (2006). Rather, faith traditions have become localized, and local communities are often dominated by a particular faith tradition or denomination, and at times even becoming a "religious enclave." *See, e.g., Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 690 (1994).

"Since colonial times the adherents of the various religious traditions and groups in America have not been randomly distributed across the country." Kosmin & Keysar, *supra*, at 105. Instead, they have settled in a patchwork pattern that includes more than 89,000 units of local government below the state level according to the

Census Bureau in 2012. U.S. Census Bureau, 2012 Census of Governments: Organization Component Preliminary Estimates, Table 2: Local Governments by Type and State, available at http://www2.census.gov/govs/cog/2012/formatted_prelim_counts_23jul2012_2.pdf (last visited on September 13, 2013). The figures below show that "[t]he geography of religion in the United States consists of a vast panoply of denominations scattered unevenly across the national landscape." Barney Warf & Mort Winsberg, *The Geography of Religious Diversity in the United States*, 60(3) The Prof'l Geographer 413, 414-15 (2008). As Warf and Winsberg note (and Figure 6 illustrates), "[o]ften counties with the highest proportions of adherents are relatively small in population size and have relatively few denominations[.]" *Id.* Further, "a single tradition or denomination still dominates most rural counties." Kosmin & Keysar, *supra*, at 121.[3]

3. Warf & Winsberg's maps show that many rural counties are dominated by a particular tradition.

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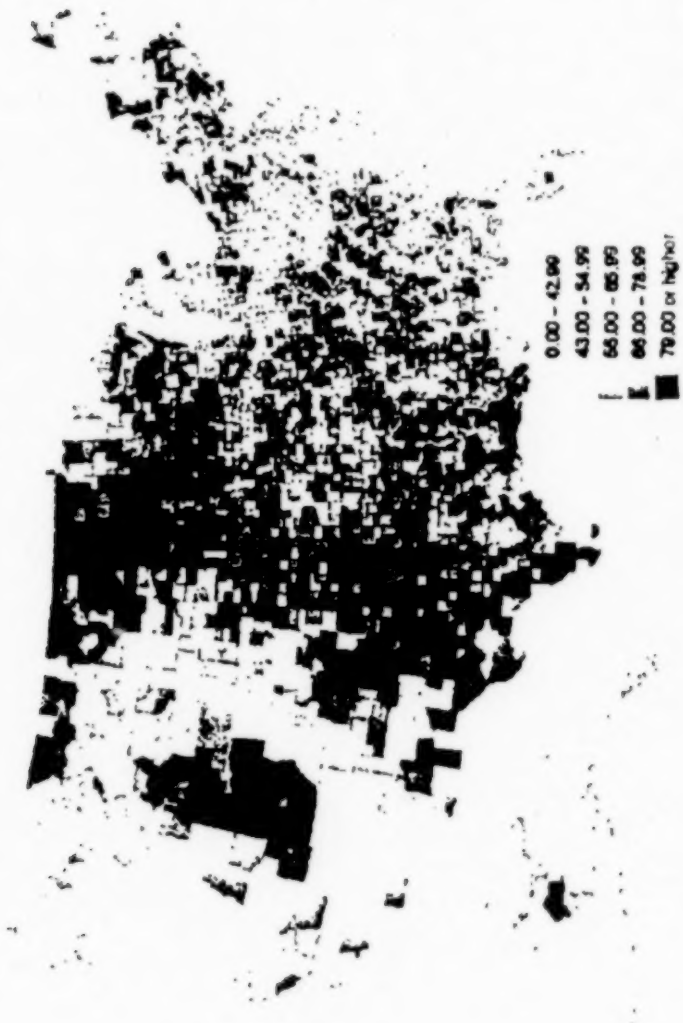

Figure 1 *Religious adherents as percentage of total county population, 2000. Intervals contain equal numbers of counties. (Source: Glenmary RCMS data.)*

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Figure 2 *Number of denominations per county, 2000. Intervals contain equal number of counties. (Source: Glenmary data.)*

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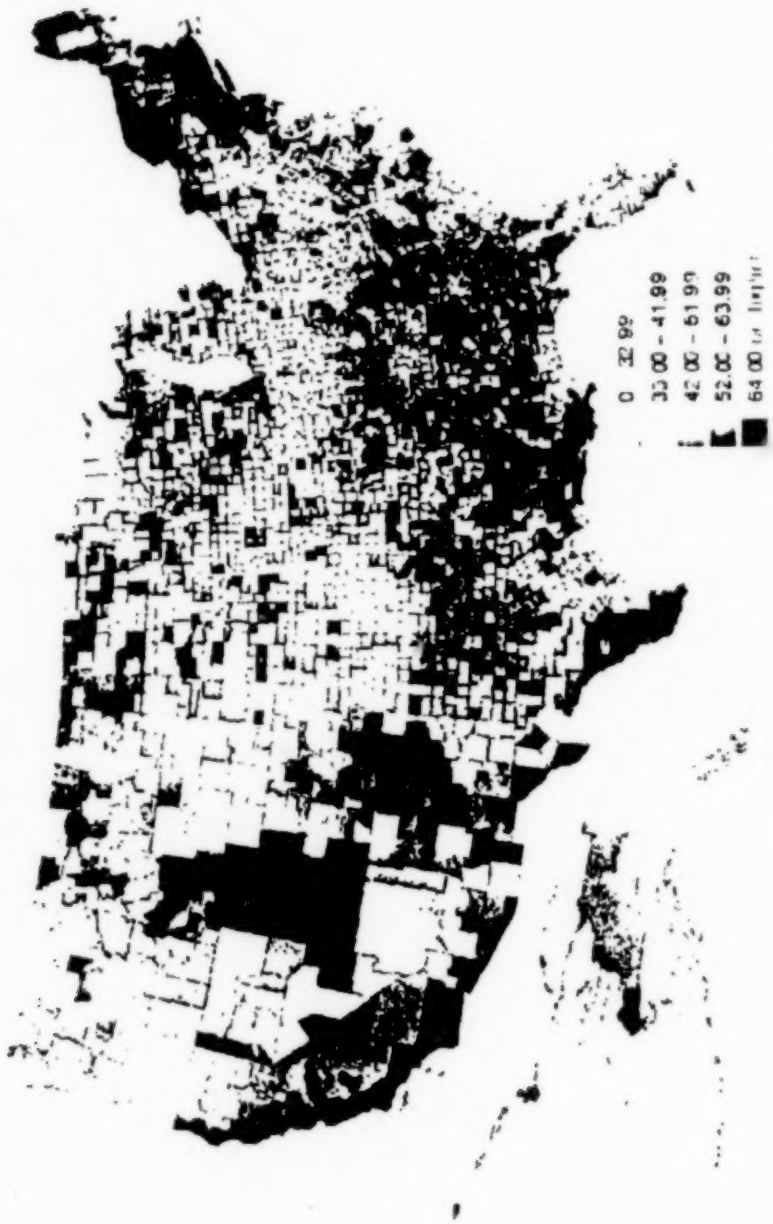

Figure 5 *Share of total adherents in each county's largest denomination, 2000. Intervals contain equal number of counties (Source: Authors, using Glenmary data.)*

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Figure 6 *Shannon index of religious diversity in 2000. Dorling cartogram. Intervals contain equal numbers of counties. (Source: Glenmary and Polis data.)*

And religious demographics are shifting. According to a 2013 survey by the Public Religion Research Institute, over the last few decades, church attendance rates have been falling and the number of religiously unaffiliated Americans—those who identify as atheistic, agnostic, or claim no formal religious affiliation—now represent 20% of the population. *See* Tannenbaum Center for Interreligious Understanding, *What American Workers Really Think About Religion: Tannenbaum's 2013 Survey of American Workers and Religion*, at 3 n.1 (citing PRRI, *Religion, Values, and Immigration Reform Survey* 2013). Christianity has the most adherents, but the proportion of the population that can be classified as Christian has declined in recent years. *See* Kosmin & Keysar, *supra*, at 24. Even within Christianity, denominations diverge widely both in practice and in regional dominance.[4]

4. The following maps were taken from Polis Center at Indiana University-Purdue University Indianapolis, Digital Atlas of America Religion, http://www.religionatlas.org (last visited on September 13, 2013).

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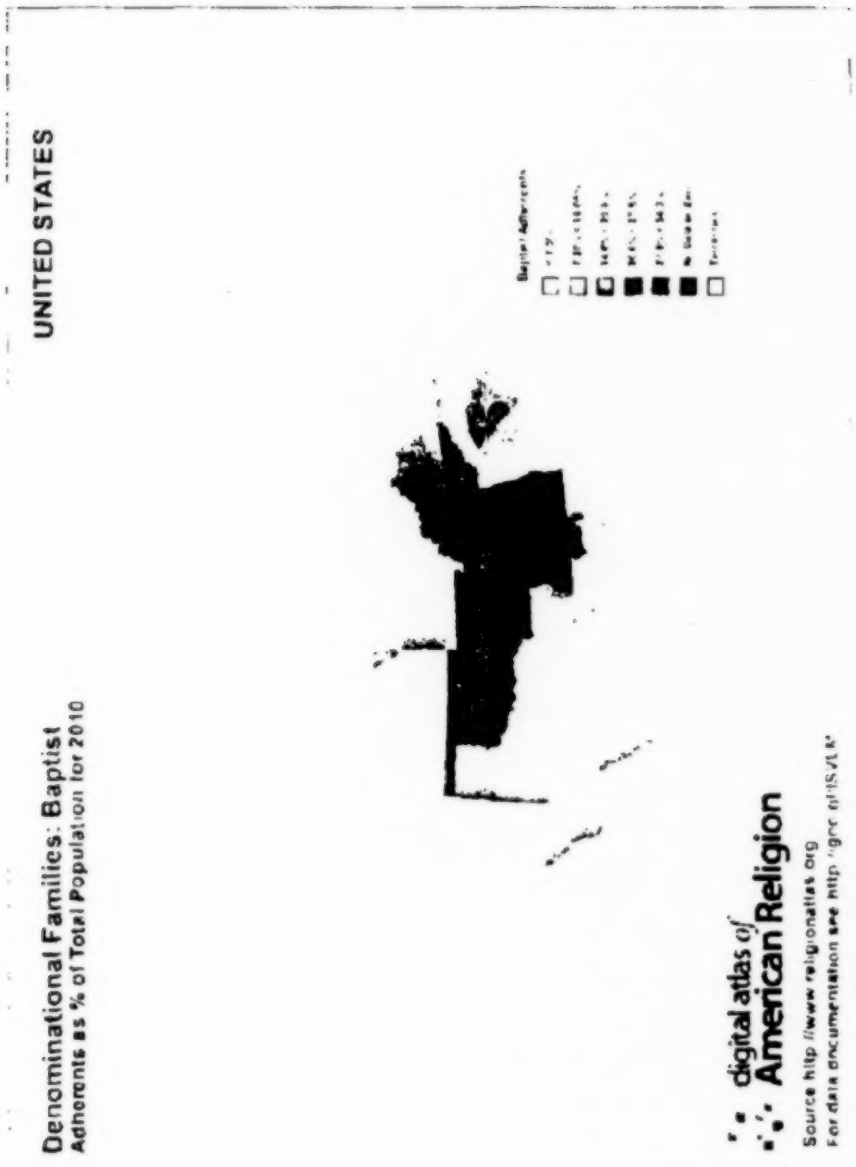

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Denominational Families: Lutheran

Adherents as % of Total Population for 2010

UNITED STATES

Lutheran Adherents

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

digital atlas of American Religion

Source: http://www.religionatlas.org

For data documentation see: http://goo.gl/iSVLM

Amicus does not take issue with the right of people to build their homes in the presence of others who share their values and their faith. As Justice Kennedy observed in *Kiryas Joel*, "People who share a common religious belief or lifestyle may live together without sacrificing the basic rights of self-governance that all American citizens enjoy, so long as they do not use those rights to establish their religious faith." 512 U.S. at 730. American citizens also enjoy the right to migrate and settle in new communities where they might be minorities. *See generally Saenz v. Roe*, 526 U.S. 489 (1999); *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). The cost of exercising that right should not be the sacrifice of their rights of equal respect to the preferences of a dominant local religious denomination.

B. Legislative prayers generally, and those used by the Town of Greece, often turn sectarian, creating an environment of coercion for the members of religious minorities in the local community.

Although the Town of Greece did not adopt a policy that exclusively allowed Christian prayers, the prayer before the Town Council meetings often turned sectarian in practice. As noted by the court below, roughly two thirds of the prayers in the record contained references to "Jesus Christ," "Jesus," "Your Son," and the "Holy Spirit." The sectarian nature of township-sponsored prayer is not unique to Greece. As discussed in a Fourth Circuit case, a Council Member who led the prayer before Town Council meetings would typically end with "In Christ's name we pray." *See Wynne*, 376 F.3d at 294. The Cobb County (Georgia) Commission as well as the Cobb

County Planning Commission opened their meetings with prayers, 70 percent of which ended with references to "our Heavenly Father" and "Jesus' name." *See Pelphrey v. Cobb County*, 547 F.3d 1263, 1267 (11th Cir. 2008).[5] And this Court has indeed recognized that *Marsh*'s holding cannot save "contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief." *County of Allegheny*, 492 U.S. at 603.

Local governmental bodies have enormous power over the rights of their citizens. Often, town councils, school directors, and zoning boards adjudicate rights in ways that involve mostly unreviewable matters of discretion. Within local communities, especially those dominated by a particular denomination, legislative prayer cannot help but have a coercive effect on religious minorities going before such bodies. For example, if a nonbeliever or member of a non-Christian religious minority went in front of the Board of Zoning Appeals for the Town of Greece, she would face seven residents of Greece who have real power over her. As the town's Code notes, the Board "affects the lives and property of many residents." *See* Greece Code §55-2. Confronting the prayer practices of the Board, she would find herself coerced to participate—or at least to refrain from objecting—when the Board of Zoning Appeals begins with a prayer in Jesus Christ's name or the name of a generic deity in which she does not believe.

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5. The 11th Circuit ruled that the prayers of the commissions were governed by *Marsh* since each commission was a legislative body under Georgia law. *Id.* at 1275. But this ignores the administrative and quasi-judicial functions performed by local governmental bodies. State legislatures are solely legislative in function. But town councils and county commissions often perform blended functions, like creating laws, hearing testimony, and adjudicating residents' rights under those laws.

After all, her property is at stake. This coercion is exactly what the Establishment Clause should prevent.

As Charles C. Haynes, senior scholar at the First Amendment Center, noted: "There are communities largely of one faith, and despite all the court rulings and Supreme Court decisions, they continue to promote one faith." *See* Neela Banerjee, *Families Challenging Religious Influence in Delaware Schools*, New York Times, July 29, 2006. When religion is permitted to play a role, even a ceremonial one, it can have devastating effects on the lives of members of religious minorities trying to live and work in a manner that does not cause them to stand out.

C. Allowing such prayers will either unleash local communities to isolate and exclude minorities with sectarian public devotions or place government in the difficult position of policing prayers to make certain that they are nonsectarian.

If the Court does not overrule *Marsh* or limit prayer to the State legislative level, it will be left with a dilemma. Either it will impose no limits on the scope of legislative prayer or it will place federal courts, local officials, and communities in the difficult business of distinguishing between acceptable and unacceptable prayer practices.

As a representative of American Jews, *amicus* is familiar with an extensive history of exclusion. The law has come a long way since the days, within the lifetime of some of our members, when it was not uncommon to see signs proclaiming "Jews and dogs not admitted." Harold Earl Quinley & Charles Young Glock, *Anti-Semitism*

in America viii (1979). As a result of such experiences, Jews have been sensitive to more subtle, but nonetheless real, expressions that they or other minority groups are unwanted as members of clubs, societies or neighborhoods.[6] Sectarian legislative prayer is one important symbolic way in which local communities can convey to outsiders of any minority faith, or to nonbelievers, that they are unwelcome. This Court should not countenance turning the clock back by authorizing xenophobia in the form of unregulated legislative prayer at the local level.

The alternative approach is equally problematic. It assigns to the federal courts the role of prayer police. This Court, which has unsuccessfully grappled for decades with the difficult task of trying to draw lines between acceptable and unacceptable expressions of prayer, was correct when it stated the federal judiciary has no business in "compos[ing] official prayers for any group of the American people to recite as part of a religious program carried on by government[.]" *Lee*, 505 U.S. at 588. Nor should such a task be entrusted to the legislative or executive branch. *See, e.g., Engel*, 370 U.S. at 422.

There is no such thing as a "nonsectarian" prayer to a nonbeliever, and any "sectarian" prayer is bound to

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6. Deed restrictions prohibiting the sale of land to Jews were widespread and still exist, although they are no longer enforceable. Indeed, when Chief Justice Rehnquist purchased his summer home in Vermont in 1974, the deed provided that "none of the conveyed property shall be leased or sold to any member of the Hebrew race." "'No Jews' deed restriction could have been removed," The Lewiston Sun Journal, p. 1, July 31, 1986; Alan S. Oser, *Unenforceable Covenants are in Many Deeds*, New York Times (August 1, 1986).

exclude someone of a different belief who may not wish to pray "in Jesus' name," or "in the name of the Father, the Son and the Holy Ghost," or in the name of a single deity. By the same token, many Americans will find prayers stripped of any specific reference to be meaningless or even theologically pernicious. As Justice Brennan observed in his dissent in *Marsh*, prayer is "serious business." 413 U.S. at 819. Only a bright line rule will take courts out of the business of serving as a board of censors on the content of legislative prayers. A doctrine that limits *Marsh* to the state and national legislatures has at least the virtue of constraining the number of occasions where federal courts will be called on to act as prayer police. But the best bright line rule—as Justice Brennan observed—is to make no exception from the Establishment Clause for legislative prayer.

D. Refusing to extend *Marsh* to townships and county governments will limit the coercive effect of legislative prayer.

1. Greater diversity at the state and national level restrains those who would overstep the current boundaries for legislative prayer.

In his classic essay on the role of factions in democratic society, James Madison wrote:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number

> of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.

Federalist Paper No. 10, *The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection* (1787).

Madison's wisdom explains one reason why, at the state level, the existence of religious diversity prevents *Marsh* from being turned into a tool of religious coercion. Adherents to a particular denomination or faith tradition do not form a majority in any state except Utah.[7]

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7. *See* the following map, which was taken from the Digital Atlas of American Religion, http://www.religionatlas.org.

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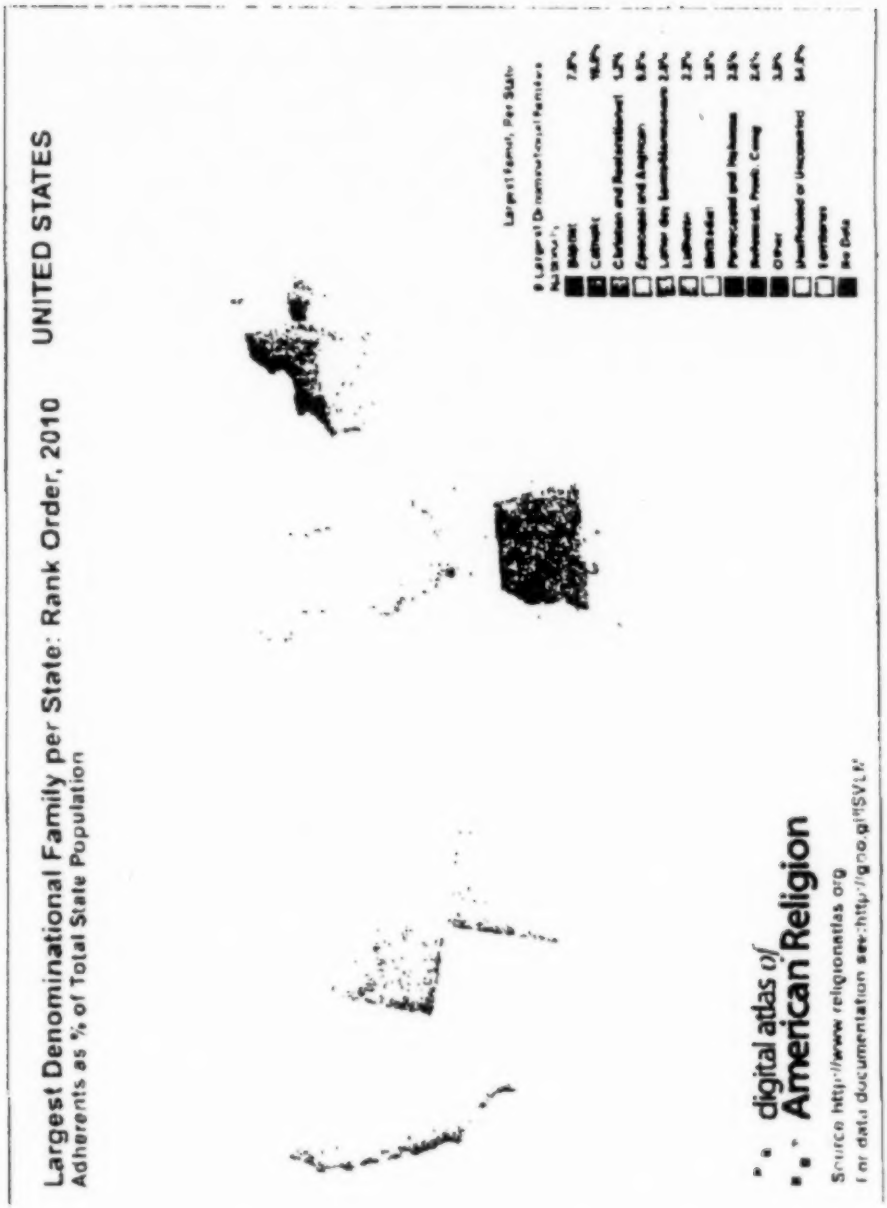
Largest Denominational Family per State: Rank Order, 2010
Adherents as % of Total State Population
UNITED STATES
digital atlas of
American Religion
Source http://www.religionatlas.org

Additionally, significant differences exist in religious profiles among regions. *See* Mark Silk and Andrew Walsh, *One Nation, Divisible* 2 (2008). Silk and Walsh explain that the Middle Atlantic has higher proportions of Catholics, Jews, and Muslims than one would expect based upon its population size. *Id.* at 2-3. Generally, the South is dominated by Baptists and evangelical and mainline Protestants. *Id.* at 5-7. The Pacific states have a high Catholic concentration, but the Pacific Northwest leads the nation in percentage of people that are religiously unaffiliated. *Id.* at 7-9. The Mountain West has many Catholics and a high Mormon concentration. *Id.* at 10-11. Finally, the Midwest is generally balanced, but Jews, Mormons, and members of Eastern religions are underrepresented. *Id.* at 11-12.

At the state and national level, the number of religious faiths constituting a significant portion of the population acts as a natural restraint on the ability of one faith to impose its will on even small religious minorities. In addition, greater public scrutiny at the state and national level makes any religious endorsement more easily detectible. The same cannot be said when a minister or a member of the zoning board invokes Jesus Christ in prayer before a governmental meeting in a predominately evangelical town.

2. **Individual citizens who object to legislative prayer are more likely to face subtle forms of retaliation if they do so at the local level because they have personal claims or interests being voted on by those whose prayers they oppose.**

Local governmental bodies can impose unique and subtle forms of coercion on religious minorities. Being

asked to bow one's head for a favorable zoning ruling may seem innocuous, but it should not happen under our Establishment Clause. Nor should children who attend a school board meeting have to endure official prayer before the vote on their application to reinstate the prom.

CONCLUSION

Marsh has not cured the communal divisiveness that legislative prayer spawns; nor has it offered any protection for religious minorities or nonbelievers. It should be overturned, not to prevent state legislators from praying, something they remain free to do before or after conducting their official duties, but to avoid the type of harms Justice Brennan articulated in his dissent.

If not overturned, *Marsh* should be limited in application to legislative prayer only at the state or national level where its harmful effects can be limited by the lack of denominational dominance, something not present at the local government level.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-696

In the Supreme Court of the United States

TOWN OF GREECE, NEW YORK,
Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Second Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). JFF has made numerous appearances in this Court as *amicus curiae*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Establishment Clause protects religious liberty and conscience by ensuring that Americans are not compelled to endorse, practice, or support a religious

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

mission. But "[i]t would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 44-45 (2004) (O'Connor, J., concurring). The Constitution restricts government ties to religion while guarding private religious expression. These complementary concepts intersect in legislative prayer, a time-honored tradition this Court affirmed in light of American history. *Marsh v. Chambers*, 463 U.S. 783 (1983).

The Second and Fourth Circuits have both thrust governmental bodies into legal quicksand where they risk crippling liability in spite of carefully crafted invocation policies. The Fourth Circuit plunges government into a theological abyss by asserting that "in order to survive constitutional scrutiny, invocations must consist of the type of nonsectarian prayers that solemnize the legislative task and seek to unite rather than divide." *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 342 (4th Cir. 2011). The Second Circuit leaves municipalities in a twilight zone of confusion where—despite their best intentions and efforts—they "may still have trouble preventing the appearance of religious affiliation." *Galloway v. Town of Greece*, 681 F.3d 20, 34 (2d Cir. 2012). The Court admits that "the touchstone of our analysis must be *Marsh*, which is hard to read, even in light of *Allegheny*, as saying that denominational prayers, in and of themselves, violate the Establishment Clause." *Id.* at 29. But in spite of its repeated acknowledgment that *Marsh* does not mandate a nonsectarian policy (*id.* at 28, 33)—the Court creates a fuzzy "totality of the circumstances" test and concludes that the Town's policy and practice

affiliate it too closely with Christianity (*id.* at 34). *Galloway* thus circumvents *Marsh* and leaves local governments with virtually no choice but to abandon the historical, cherished American tradition of opening legislative sessions with an invocation.

One escape from this legal quagmire is to require evidence of "exploitation"—the standard announced in *Marsh* and followed recently by the Ninth and Eleventh Circuits. *Marsh v. Chambers*, 463 U.S. at 794-795; *Rubin v. City of Lancaster*, 710 F.3d 1087, 1094 (9th Cir. 2013); *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, *33 (11th Cir. 2013); *see also Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1273, 1277 (11th Cir. 2008). Any standard that restricts or bans "sectarian" references is unworkable and unconstitutional. So is any other standard where the government polices prayer. All the government can do is adopt a neutral selection process for inviting speakers to pray and respect the conscience of these volunteers by avoiding control or censorship where no "exploitation" is evident. *Marsh* provides a workable test, in sharp contrast to the hopelessly muddied *Galloway* and *Joyner* rulings.

ARGUMENT

I. ANY POLICY THAT EVALUATES PRAYER CONTENT WOULD CREATE INSURMOUNTABLE LEGAL HURDLES.

Legislative prayer is a unique genre sanctioned by this Court—a hybrid combining elements of public and private expression.

Unlike *Joyner*, *Galloway* does not attempt to mandate a non-sectarian prayer policy. But its "totality of the circumstances" analysis is equally untenable, improperly relegating the government to a role where it must evaluate the prayers of private citizens. The Second Circuit does not categorically exclude sectarian references but suggests that "the distinction between sectarian and nonsectarian prayers merely serves as a shorthand, albeit a potentially confusing one, for the prohibition on religious advancement or affiliation outlined in *Marsh* and *Allegheny*." *Galloway*, 681 F.3d at 28. This confusing "shorthand" would either thrust courts into forbidden theological territory or squelch the liberties of citizens who volunteer to pray for their governments. Such a classic Catch-22 violates both Establishment Clause and Free Speech principles. The government becomes enmeshed in religion if the prayers are government speech but risks viewpoint discrimination if they are private speech. Existing precedent does not require either alternative.

"There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 765 (1995), citing *Bd. of Educ. v. Mergens,* 496 U.S. 226, 250 (1990) (emphasis added). *Marsh* strikes the right balance and preserves liberty: "The *Marsh* test allows courts to guard against governmental promotion of a particular faith tradition, while respecting the right of any prayer-giver to offer an invocation in that individual's religious tradition by refusing to police the content of prayers." Pet. 23.

Legislative prayer cases have not fleshed out the critical public-private speech distinction where *private* citizens pray in a *government* setting. Courts gloss over the difference. Two cases expressly hold that legislative invocations are government speech: *Simpson v. Chesterfield Cnty. Bd. of Comm'rs*, 404 F.3d 276, 288 (4th Cir. 2005); *Turner v. City Council*, 534 F.3d 352, 355 (4th Cir. 2008). Others presuppose government speech by using an Establishment Clause analysis: *Wynne v. Town of Great Falls*, 376 F.3d 292, 296-302 (4th Cir. 2004); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1231-34 (10th Cir. 1998); *Joyner*, 653 F.3d at 349; *Rubin*, 710 F.3d at 1091 n. 4; *Atheists of Fla.*, 713 F.3d at *32. *Galloway* follows the latter line of cases. *Galloway*, 681 F.3d at 26.

The Eleventh Circuit implicitly acknowledged the tension between public and private expression when it upheld one prayer policy against an Establishment Clause challenge while finding a prior policy unconstitutional because it excluded certain faiths. *Pelphrey*, 547 F.3d at 1268-79. The exclusion of particular faiths is tantamount to the viewpoint discrimination prohibited where *private* speech is at issue. The Tenth Circuit observed the "inversion of the usual posture" in some Establishment Clause challenges to legislative prayer. These cases often involve the member of a particular faith alleging the state has "established" a religion by allowing a government-sanctioned speaker to deliver an invocation while denying him the opportunity to pray. *Snyder*, 159 F.3d at 1231. The *Snyder* plaintiff complained when the city council denied him the opportunity to offer a "prayer" that mocked the genre itself (legislative prayer). The Court framed the issue

as an Establishment Clause challenge, but it reads more like a Free Speech claim alleging viewpoint discrimination. *Id.* at 1228.

Where private citizens pray in a government context, lines are not easily drawn. The government speech doctrine has only developed since *Marsh*. Outside the legislative prayer arena, some courts have used a four-factor test to distinguish government from private speech: purpose, editorial control, identity of the literal speaker, and ultimate responsibility for the content. *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1094-95 (8th Cir. 2000) (public radio station program was government speech); *Wells v. City & County of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001) (city's holiday display was government speech, allowing exclusion of atheist plaintiffs' "Winter Solstice"). Only one legislative prayer case has utilized the *Knights*' test. The Fourth Circuit applied it to conclude that Fredericksburg's nondenominational invocation policy did not violate the free speech rights of a Baptist minister (Turner) who was also a Council member. *Turner*, 534 F.3d at 355. The invocation was on the agenda (*id.* at 354), the Council exercised editorial control and the "literal speaker" was a Council member acting in his official capacity (*id.* at 355).

Most courts--including the Second Circuit—refuse to hold that the Constitution mandates a nonsectarian policy. *Galloway*, 681 F. 3d at 28; *Atheists of Fla.*, 713 F.3d at 38; *Turner*, 534 F.3d at 356; *Snyder*, 159 F.3d at 1233-34; *Pelphrey*, 547 F.3d at 1271 ("The taxpayers argue that *Allegheny* requires us to read *Marsh* narrowly to permit only nonsectarian prayer, but they

are wrong.") The Ninth Circuit reaches all the way back to 1800, when:

> ...to mark the death of George Washington, a legislative chaplain petitioned that all "may obtain unto the resurrection of life, through Jesus Christ our Lord; at whose second coming in glorious majesty to judge the world . . . those who sleep in him shall be . . made like unto his own glorious body." Henry Lee III, *An Address and a Form of Prayer, in An American Prayer Book* 58-59 (Christopher L. Webber ed., 2008).

Rubin, 710 F.3d at 1093. Even *Joyner* declared only that "legislative prayer must strive to be nondenominational so long as that is reasonably possible." *Joyner*, 653 F.3d at 349.

Any demand that legislative prayer conform to a nonsectarian or other government-imposed standard is "fraught with constitutional peril" (*Rubin*, 710 F.3d at 1097)—a "remedy [that] comes with its own set of First Amendment infirmities" (*id.* at 1100). Even the Second Circuit warns that such a policy "runs into two sizable doctrinal problems"—establishing a civic religion plus the difficulty in reconciling such an approach with *Marsh*, even in light of *Allegheny*. *Galloway*, 681 F. 3d at 28-29. In addition to Establishment Clause concerns, government regulation of private prayer would be equally unlawful.

A. Government-Controlled Prayer Is Both Unconstitutional And Unworkable.

In spite of its illicit journey into theological territory, the Second Circuit warns that "[u]nder the First Amendment, the government may not establish a vague theism as a state religion any more than it may establish a specific creed." *Galloway*, 681 F.3d at 29.

If invocations are government speech, as courts often presume, the Establishment Clause precludes any policy that requires the government to monitor prayer content. Invocation speakers are comparable to the teachers in *Lemon*—they are not static like a book or monument, but persons who pray according to conscience. *Lemon v. Kurzman*, 403 U.S. 602, 619 (1974). Ongoing government surveillance of their prayers enmeshes the government in a theological exercise it is not competent to perform. Indeed, this Court signaled that a nonsectarian prayer policy might be constitutionally flawed. *Lee v. Weisman*, 505 U.S. 577, 588 (1992) ("it is no part of the business of government to compose official prayers for any group of the American people"—quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)).

A nonsectarian policy would be extraordinarily vague and impractical. How many sectarian references are "too many"? What time frame should be considered? Must speakers write their prayers and submit them in advance for approval? (That scenario raises the issue of prior restraint.) How does government control a speaker who violates the policy? The Second Circuit admitted that *Marsh* does not

mandate nonsectarian prayers but engaged in the very "parsing" *Marsh* forbids, analyzing the content of the Town's invocations without citing evidence of prohibited exploitation. *Galloway*, 681 F.3d at 28-29. The Court even suggested that the Town look beyond its borders to select clergy. *Id.* at 31. But how far must it look?

Any test that hinges on the frequency of sectarian references—as in *Joyner* and *Galloway*—is not only hopelessly subjective but compels the government to parse content. The Eleventh Circuit wisely noted that the line between "sectarian" and "nonsectarian" is "best left to theologians, not courts of law." *Pelphrey*, 547 F.3d at 1267. *Pelphrey* read *Turner* as declining to hold that *Marsh* mandates a non-sectarian prayer policy. "[T]he Establishment Clause does not absolutely dictate the form of legislative prayer." *Id.* at 1273, quoting *Turner*, 534 F.3d at 356; *see also Snyder*, 159 F.3d at 1233-34. *Snyder* also cautions that a government entity might fall "dangerously close to the 'quagmire' of 'excessive entanglement'" if a volunteer speaker were rejected on the basis of religious persuasion. *Id.* at 1231.

The government should never empower officials to censor private prayers. *Marsh* does not require that result, but instead cautions that courts must *not* consider the content *unless* there is already evidence "that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh v. Chambers*, 463 U.S. at 794-795, quoted by *Atheists of Fla.*, 713 F.3d at *38. In *Wynne*, the Fourth Circuit permitted "parsing" only because the record was already "replete with powerful

indication[s] that the Town Council did indeed 'exploit' the prayer opportunity 'to proselytize or advance' one faith." *Wynne*, 376 F.3d at 299, n. 4. *Wynne* is unusual because the Town Council—the government itself—refused to allow non-Christian prayers.

Even *Joyner* does not support *Galloway's* radical approach. The Fourth Circuit restricted sectarian references but did not decree an absolute ban. *Joyner*, 653 F.3d at 351 ("courts should not be in the business of policing prayers for the occasional sectarian reference"). Forsyth County's neutral policy welcomed a diversity of invocations speakers. Although a high percentage of the invocations contained sectarian references (*id.* at 344), this was solely the result of *private* choices—not *government* exploitation or influence. Under *Galloway's* rationale, even the most carefully crafted policy will fail if the random selection process results in too many volunteers from the same religious tradition, as it did in Forsyth County and the Town of Greece. That can easily happen if followers of a particular faith are concentrated in a region—and in the Second Circuit, the government is now obliged to look beyond its own borders, creating an even more unworkable standard and a heightened risk of litigation. *Galloway*, 681 F.3d at 31 ("The randomness of the process...was limited by the town's practice of inviting clergy almost exclusively from places of worship located within the town's borders."). Drawing the precise line immerses the government in religion by requiring it to evaluate the content or count the number of prayers from a particular faith. But *Marsh* only excludes aggressive advocacy. "[T]he mere fact a prayer evokes a particular concept of God is not enough

to run afoul of the Establishment Clause." *Snyder*, 159 F.3d at 1234, n. 10.

B. If The Prayers Are *Private* Speech, Government Oversight Of The Content Is Impermissible Viewpoint Discrimination.

Even in the context of a government-sponsored activity, the content of prayer must be "left to the particular prayer-giver's conscience, consistent with the rights to freedom of speech and religious expression." Pet. 22. The Eleventh Circuit recently reviewed a prayer policy that characterized invocations as the "voluntary offering of a private citizen." *Atheists of Fla.*, 713 F.3d at *18. *Galloway* misses this point. The Second Circuit recognized the dangers of censorship but framed the problem as a risk the government might establish a "civic religion." *Galloway*, 681 F.3d at 34. That is indeed a risk, but the problem is that such a "religion" potentially transgresses private speech rights. The Ninth Circuit made the connection and cautioned that:

> [A]dopting a "vague theism" as civic religion would also risk shutting out those religious leaders who, perhaps for doctrinal reasons, are disinclined to restyle or dilute their prayers. *See* Robert J. Delahunty, *"Varied Carols": Legislative Prayer in a Pluralist Polity*, 40 Creighton L. Rev. 517, 526-27 (2007) ("Faced with the choice of praying in conformity with a government-imposed standard of orthodoxy or not praying at all, many clergy (to their credit) will choose not to pray at all.").

Rubin, 710 F.3d at 1100 n. 15. Under a mandatory "vague theism," viewpoint discrimination is inescapable. One Ten Circuit judge warned that it is:

> ...misguided...to read this single passage from *Marsh* [463 U.S. at 794-795] as standing for the far-reaching proposition that a governmental body can, in all circumstances, allow certain legislative prayers while censoring and barring others because they "proselytize" or "disparage" another faith or religious belief.

Snyder, 159 F.3d at 1237 (Lucero, J., concurring). *Snyder's* caution underscores the private speech component when community volunteers offer invocations. If the prayers are private speech, the government cannot censor the expression merely because it represents the viewpoint of a unique faith tradition rather than an elusive "civic religion."

The "identity of the invocational speaker" is a crucial element for legislative prayer in the Eleventh Circuit. *Pelphrey*, 547 F.3d at 1277. The speaker's identity varies in legislative prayer cases. Government agents were responsible for the invocations in *Marsh*, 463 U.S. at 784 (chaplain employed by state); *Wynne*, 376 F.3d at 294 (council member); and *Turner*, 534 F.3d at 353 (same). Private speakers said the prayers in *Simpson*, 404 F.3d at 279; *Pelphrey*, 547 F.3d at 1266; *Snyder*, 159 F.3d at 1228; *Joyner*, 653 F.3d at 343. It is difficult to conceive of these invocations as *government* speech. But in spite of the speakers' personal responsibility in *Joyner*, the Fourth Circuit dismissed the "identity of the speaker" as irrelevant (*Joyner*, 653 F.3d at 350) and invalidated the prayers

because of their "proximity...to official government business" (*id.* at 347). But where randomly selected private speakers are invited to pray without government oversight—as they commonly are in post-*Marsh* cases—the risk of impermissible viewpoint discrimination is high and cannot be so easily dismissed.

Several cases involving license plates highlight the dangers of viewpoint discrimination when government and private speech elements overlap:

> Although the Supreme Court has not yet recognized that speech can be governmental and private at the same time, its decisions on government speech and viewpoint discrimination provide instruction on whether the State's viewpoint discrimination in the license plate forum can stand.

Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 795-796 (4th Cir. 2004). Two factors favored government speech while two others leaned toward private speech. *Id.* at 794, citing *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV*, 305 F.3d 241, 244-45 (4th Cir. 2002) (suggesting it is an "oversimplification [to assume] that all speech must be either that of a private individual or that of the government and that a speech event cannot be *both* private and governmental at the same time"). Suppression of a particular viewpoint—preventing the veterans' organization from including the Confederate flag in its design—was impermissible.

The Eleventh Circuit, tracking *Marsh*, explained that "[t]he 'impermissible motive' standard does not require that all faiths be allowed the opportunity to pray [but] instead prohibits purposeful discrimination." *Atheists of Fla.*, 713 F.3d at *35, citing *Pelphrey*, 547 F.3d at 1281-82 (holding that "categorical exclusion of certain faiths based on their beliefs is unconstitutional"). Such deliberate exclusion is tantamount to prohibited viewpoint discrimination where private speech is at issue.

In other Establishment Clause contexts, this Court has stressed the element of private choice, "holding time and time again that when a neutral government policy or program merely allows or enables private religious acts, those acts do not necessarily bear the state's imprimatur." *Rubin*, 710 F.3d at 1099. Modern invocation policies strive for inclusivity and facilitate the voluntary prayers of private citizens. It would be improper for the government to regulate those choices.

II. THE TOWN'S POLICY AND PRACTICE FITS SQUARELY WITHIN THE CONTOURS OF *MARSH*.

By refusing to police the content of prayers, *Marsh* provides a liberty-focused framework that "allows courts to guard against *governmental* promotion of a particular faith tradition, while respecting the right of any prayer-giver to offer an invocation in that individual's religious tradition." Pet. 23. *Marsh* established legislative prayer as a unique genre "with its own set of boundaries and guidelines." *Simpson*, 404 F.3d at 281, citing *Snyder*, 159 F.3d at 1232. It has

coexisted with disestablishment since colonial times. *Marsh*, 463 U.S. at 786.

Although history alone does not establish the constitutionality of a practice or create a vested right in violation of the Constitution, contemporaneous actions of the draftsmen shed light on their intent. *Id.* at 790. "[A]n unbroken practice...is not something to be lightly cast aside." *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970). Legislative prayer is "part of the fabric of our society." *Marsh*, 463 U.S. at 792. *Marsh* involved a chaplain hired and paid by the state, but Congress has also historically practiced a system of inviting local clergy to officiate. *Simpson*, 404 F.3d at 286, citing *Marsh*, 463 U.S. at 789 n. 10. As *Turner* observed, "both varieties of legislative prayer...recognize the rich religious heritage of our country." *Turner*, 534 F.3d at 356. Moreover, courts have extended *Marsh* to comparable activities rooted in historical tradition: *Murray v. Buchanan*, 720 F.2d 689, 689 (D.C. Cir. 1983) (en banc) (paid legislative chaplain at the United States Congress); *Newdow v. Eagen*, 309 F. Supp. 2d 29 (D.D.C. 2004) (same); *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985) (prayer offered by military chaplains on Army bases); *Newdow v. Bush*, 355 F.Supp.2d 265 (D.D.C. 2005) (Presidential Inauguration).

Even the *Marsh* dissent recognized that "government cannot, without adopting a decidedly *anti*-religious point of view, be forbidden to recognize the religious beliefs and practices of the American people as an aspect of our history and culture." *Marsh*, 463 U.S. at 810-811 (Stevens, J., dissenting). *Lemon* also attests to the importance of history in evaluating Establishment Clause claims, noting this Court's

rejection of a claim that tax exemptions for houses of worship might lead to establishment. That contention could not stand against "more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present." *Lemon v. Kurzman*, 403 U.S. at 624, citing *Walz v. Tax Comm'n*, 397 U.S. 664. This Court has rejected a "rigid, absolutist view of the Establishment Clause" that "would undermine the ultimate constitutional objective as illuminated by history." *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984), citing *Walz v. Tax Comm'n*, 397 U.S. at 671. *Allegheny* qualified the role of history with its caution against affiliating the government with a particular religion, but noted that "legislative prayer does not urge citizens to engage in religious practice." *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 n. 52 (1989).

Modern prayer policies are "in many ways more inclusive than that approved by the *Marsh* Court." *Simpson*, 404 F.3d at 285; *see Atheists of Fla.*, 713 F.3d at 37 (Lakeland's policy more expansive than the one approved in *Pelphrey*). The *Marsh* chaplain was paid with public funds, while speakers in later cases are typically unpaid volunteers. *Id.* Governments now welcome a broad spectrum of religious leaders, in contrast to the Presbyterian minister employed for 16 years in *Marsh*. *Id.* The normal policy is to schedule speakers in a neutral manner that precludes government oversight. *Id.* These factors bring modern policies well within *Marsh*—and even enable them to pass more traditional Establishment Clause tests. A nonsectarian mandate—or any other approach requiring government regulation of prayer—would generate a whole new set of legal obstacles. Indeed,

"invalidating a practice of prayer more inclusive than that upheld in *Marsh* 'would achieve a particularly perverse result.'" *Pelphrey*, 547 F.3d at 1273, quoting *Simpson*, 404 F.3d at 287.

The Ninth Circuit recently hammered the importance of the government's role, summarizing the inquiry as "whether *the City itself* has taken steps to affiliate itself with Christianity" (emphasis added), not merely "the frequency of Christian invocations." *Rubin*, 710 F.3d at 1097. "Whatever the content of the prayers or the denominations of the prayer-givers, the *City* chooses neither." *Id.* at 1098 (emphasis in original). The *Rubin* majority quoted *Joyner's* dissent with approval:

> In determining what it means to "advance" one religion or faith over others, the touchstone of the analysis should be whether *the government* has placed its imprimatur, deliberately or by implication, on any one faith or religion.

Id. at 1095-1096, quoting *Joyner*, 653 F.3d at 362 (Niemeyer, J., dissenting). This approach is consistent with *Marsh*, severely limiting government control over prayer content.

The Town of Greece did not orchestrate the "steady drumbeat of often specifically selected Christian prayers" that the Second Circuit complains would affiliate it with Christianity. *Galloway*, 681 F.3d at 32. In order to reach that conclusion and formulate its "totality of the circumstances" test, the Court had to engage in the parsing of prayer content that *Marsh* forbids (*id.* at 32, e.g., critiquing invocations using the

first person plural)—all the while admitting that "the prayers in the record were not offensive in the way identified as problematic in *Marsh*" (*id.* at 31-32).

III. LEGISLATIVE PRAYER IS A UNIQUE GENRE THAT BLENDS ELEMENTS OF GOVERNMENT AND PRIVATE SPEECH AND COMPLIES WITH BASIC FIRST AMENDMENT PRINCIPLES FOR BOTH.

The Town of Greece has an informal invocation policy that complies with the First Amendment—both the Establishment Clause *and* private expression.

"The interaction between the 'government speech doctrine' and Establishment Clause principles has not...begun to be worked out." *Pleasant Grove City v. Summum*, 129 S.Ct. 1125, 1141 (2009) (Souter, J., concurring). Legislative prayer is a unique form of expression combining elements of both public and private speech, and classification may hinge on a particular policy's wording. In the Town of Greece, invocations occur in the context of government business—but private speakers are volunteers scheduled on a rotating basis that encourages diversity and excludes government oversight of the prayers. *Galloway*, 681 F.3d at 23-24 (describing current procedure for compiling a list of potential speakers). The Town has never denied a request to give the invocation, nor has it has attempted to control the content of the prayers. *Id.* at 23. The private citizens who volunteer to pray are ultimately responsible for what they say. This tracks the broader principle that the *government* does not advance religion when any indirect benefit results solely from *private* choices.

Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1448 (2011) ("contributions result from the decisions of private taxpayers regarding their own funds").

Long before the government speech doctrine emerged, this Court described legislative prayer as "a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh,* 463 U.S. at 792; cited in *Simpson,* 404 F.3d at 282 and *Atheists of Fla.*, 713 F.3d at *32. *Marsh* is a "striking example of the accommodation of religious belief intended by the Framers," because America's first congressmen had no constitutional problem with employing chaplains to offer daily prayers in the Congress. *Lynch v. Donnelly*, 465 U.S. at 674. The government is permitted "some latitude in recognizing and accommodating the central role religion plays in our society.... Any approach less sensitive to our heritage would border on latent hostility toward religion." *Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring).

The Second Circuit's approach is insensitive to America's heritage and hostile toward religion. This is contrary to the well-established principle *Marsh* illustrates:

> [T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. See, *e. g., Zorach v. Clauson,* 343 U.S. 306, 314, 315 (1952); *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203, 211 (1948). Anything less would require the 'callous indifference' we

> have said was never intended by the *Establishment Clause*. *Zorach*, *supra*, 343 U.S. at 314.

Lynch v. Donnelly, 465 U.S. at 673. Even the *Marsh* dissent acknowledged "that, in one important respect, the Constitution is *not* neutral on the subject of religion: Under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional rights that other strongly held beliefs do not." *Marsh*, 463 U.S. at 812 (Stevens, J., dissenting). The *Marsh* majority respected both the Establishment Clause and the free speech rights of volunteers who offer to pray for their governments.

A. Even If *Lemon* Applied, Legislative Prayer Is Constitutional.

Several Justices of this Court and numerous scholars "have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring).[2] *Lemon's* incoherent test has proved unworkable in practice and should be relegated to the scrap heap of history as a failed 40-year experiment. Yet *Lemon* still "stalks our Establishment Clause jurisprudence" as this Court applies, buries, and sometimes ignores it—but so far refuses to renounce it. *Id.* at 398.

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[2] *See id.* at 399-400 for details of these critiques.

In *Marsh*, this Court abandoned *Lemon* because legislative prayer is "deeply embedded in the history and tradition of this country." *Marsh*, 463 U.S. at 786. Legislative prayer has stood the test of time—over two centuries—in striking contrast to the recently minted *Lemon* test. The Eighth Circuit decision overruled in *Marsh* applied *Lemon*, holding that the "purpose and primary effect" was to advance religion, because of the chaplain's long tenure, and forbidden "entanglement" resulted from the use of state funds. *Marsh*, 463 U.S. at 786. This Court rejected that approach and should reaffirm its own precedent in this case.

Lemon itself acknowledged the "blurred, indistinct, and variable barrier" between church and state, noting that absolute separation is impossible and some interaction is inevitable. *Lemon v. Kurzman*, 403 U.S. at 614. A year later, this Court reaffirmed the need to "reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that...total separation of the two is not possible." *Lynch v. Donnelly*, 465 U.S. at 672.

Marsh rightly eschewed *Lemon*. But even if it applied, modern prayer policies address the *Lemon* concerns of the *Marsh* dissent and could survive either *Lemon* or Justice O'Connor's more recent "endorsement" test.

1. Legislative Invocations Serve A Recognized Secular Purpose: They Solemnize Government Proceedings.

The Framers "would surely regard it as a bitter irony that the religious values they designed those Clauses to *protect* have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it." *McCreary Cnty., Kentucky v. Am. Civil Liberties Union of Kentucky,* 545 U.S. 844, 902-903 (2005) (Scalia, J., dissenting). *Lemon's* "secular purpose" prong clashes with one of the First Amendment's key purposes—to protect religious liberty.

Nevertheless, legislative prayer serves legitimate secular purposes, such as "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch v. Donnelly,* 465 U.S. at 693 (O'Connor, J., concurring); *Atheists of Fla.*, 713 F.3d at *12-13; *Joyner*, 653 F.3d at 347; *Simpson,* 404 F.3d at 283. As Petitioner observes, "[u]nder *Marsh*, the touchstone for whether legislative prayer is constitutional is whether the government acts with impermissible motive." Pet. 17-18. A crucial inquiry, tracking *Marsh*, is whether the government has "categorically excluded specific faiths based on their beliefs." *Pelphrey*, 547 F.3d at 1282. In fact, "the bar for proving such impermissible motive is quite high" in light of *Marsh*—"the virtually uninterrupted sixteen year tenure of a single Presbyterian minister." *Pelphrey v. Cobb Cnty.*, 410 F. Supp. 2d 1324, 1337 (N.D. Ga. 2006). In *Marsh*, this Court found no

impermissible motive in spite of the chaplain's lengthy tenure and payment from public funds. *Marsh,* 463 U.S. at 793-794. Even the disproportionate representation of one faith does not, per se, prove that an impermissible motive exists. *Pelphrey*, 547 F.3d at 1277. It may merely reflect the religious composition of the local community (*Atheists of Fla.*, 713 F.3d at *36)—and does not detract from the legitimate purpose of solemnizing government meetings.

2. Legislative Prayer Does Not Impermissibly Advance Religion.

In contrast to *Lemon's* second prong, the First Amendment arguably "advances" religion through its heightened protection for religious expression:

> [P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.... [G]overnment suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Capitol Square Review, 515 U.S. at 760. It is "a strange notion, that a Constitution which *itself* gives 'religion in general' preferential treatment...forbids endorsement of religion in general." *Lamb's Chapel,* 508 U.S. at 400 (Scalia, J., concurring). Even so, legislative prayer does not transgress *Lemon's* boundary line. Any benefit the Town's policy confers on a particular faith is at best "indirect, remote, and incidental." *Lynch v. Donnelly,* 465 U.S. at 683, citing

Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973), *Widmar v. Vincent*, 454 U.S. 263, 273 (1981).

Even *Marsh* does not condone the use of legislative prayer to affiliate the government with a particular faith. *Wynne*, 376 F.3d at 297, citing *Allegheny*, 492 U.S. at 603. The Eleventh Circuit identified three factors to assess whether that has happened: (1) the identity of the speaker; (2) the selection procedures employed; and (3) the nature of the prayers. *Pelphrey*, 547 F.3d at 1277. In the Town of Greece, invocations are given by unpaid volunteers, selected by "telephoning, at various times, all the religious organizations listed in the town's Community Guide." *Galloway*, 681 F.3d at 23. The Second Circuit admits that none of the prayers in the record offend *Marsh*—"they did not preach conversion, threaten damnation to nonbelievers, down other faiths, or the like." *Id.* at 31-32. No one—legislator or citizen—is required to participate in the invocation. The prayers—which must be offered by the representative of *some* particular faith—are simple blessings in line with over two centuries of unbroken American practice.

A few cases interpret *Allegheny's* comments about *Marsh*—warning about government affiliation with a particular faith—as holding that *Marsh* mandates a nonsectarian policy. *See Allegheny*, 492 U.S. at 603. Two of these cases were vacated, remanded, and later dismissed for lack of standing: *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494 (5th Cir. 2007) and *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006). In another case, the Town Council refused to *allow* invocations that were not explicitly Christian. *Wynne*,

376 F.3d at 295. In the Town of Greece, as in the City of Lakeland (*Atheists of Fla.*), Christian references result solely from a random procedural process, coupled with the private choices of volunteers who respond to an open invitation designed to foster diversity. Those choices do not affiliate the *government* with Christianity, nor do the sectarian references per se constitute the aggressive advocacy precluded by *Marsh* and *Allegheny*.

3. Modern Legislative Prayer Policies Avoid Forbidden Entanglement By Opening The Prayer Opportunity To A Wide Variety Of Randomly Selected Speakers.

The *Marsh* dissent contended there was entanglement in the process of selecting a "suitable" chaplain and limiting that person to "suitable" prayers. *Marsh*, 463 U.S. at 798-799 (Stevens, J., dissenting). The Town's policy avoids this objection by inviting a wide spectrum of potential speakers without inquiry into their beliefs or oversight of their prayers, and then scheduling them on a rotating basis. This process avoids the entanglement that would almost certainly result if the Town adopted a mandatory nonsectarian policy or otherwise monitored the content of the invocations. It is the Second Circuit—not the Town—that entangles itself in the prayers of private citizens.

B. A Reasonable Observer Would Not Perceive The Town's Policy Or Practice As Government Endorsement Of A Particular Faith.

The Second Circuit creates a novel and nearly unattainable standard for legislative invocation policies. Its rationale twists the endorsement test and widens the split among circuit courts, which "are hopelessly divided over whether legislative prayer practices should be analyzed under *Marsh's* historical test or instead under an 'endorsement' test derived from *County of Allegheny*." Pet. 2.

Based on *Marsh*, Justice O'Connor's endorsement test is not the proper analysis. And like the *Lemon* test from which it derives, it is a failed modern experiment. This highly subjective test requires fine tuning to apply and has spawned lawsuits over trivial offenses—based on the disapproval of an imaginary "reasonable" observer. But a careful review of the test—as explained and interpreted by Justice O'Connor's own observations—reveals that the Town's policy would survive it. The test is qualified: The *reasonable* observer "must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape." *Elk Grove v. Newdow*, 542 U.S. at 35 (O'Connor, J., concurring). The consequences would be overwhelming if the test were read to encompass even the slightest offense and allow a "hecker's veto" to rule the outcome. *Id.* at 35 (O'Connor, J., concurring), citing *Capitol Square Review*, 515 U.S. at 780 ("There is always *someone* who, with a particular quantum of knowledge, reasonably

might perceive a particular action as an endorsement of religion.").

The endorsement test rests partially on the same historical foundation as *Marsh*: "[T]he history and ubiquity of a practice...provides part of the context in which a reasonable observer evaluates whether a challenged government practice conveys a message of endorsement of religion." *Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring). Legislative prayer and other similar practices "are not understood as conveying government approval of particular religious beliefs." *Lynch v. Donnelly*, 465 U.S. at 693 (O'Connor, J., concurring).

The Second Circuit is oblivious to the role of religion in American history and culture. The First Amendment itself endorses religion. The Framers "would surely regard it as a bitter irony that the religious values they designed those Clauses to *protect* have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it." *McCreary*, 545 U.S. at 902-903 (2005) (Scalia, J., dissenting). Decades ago, this Court found "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach v. Clauson*, 343 U.S. 306, 313-314 (1952). On the contrary, religious expression holds a place at the core of protected First Amendment speech. *See Capitol Square Review*, 515 U.S. at 760.

People who reject religion are entitled to reasonable accommodation but not complete protection from

exposure to religious expression: "[S]ome references to religion in public life and government are the inevitable consequence of our Nation's origins." *Elk Grove v. Newdow*, 542 U.S. at 35 (O'Connor, J., concurring); *see also Capitol Square Review*, 515 U.S. at 780 (O'Connor, J., concurring). A reasonable observer—presumed to be familiar with the time-honored practice of legislative prayer, America's rich religious history, and the Town's policy—would not perceive the invocations as government endorsement of a particular faith.

C. The Town Respects The Parameters Of The Limited Public Forum It Has Created.

The Establishment Clause applies only to government speech—not private expression in a public forum. *Capitol Square Review*, 515 U.S. at 767, 770. Although the Town's policy should pass muster even under a government speech analysis, the Town may have created a forum for private speech by using community volunteers rather than a paid chaplain. Pet. 23-25 (Sect. III). If so, it properly avoids the "purposeful discrimination" against any particular faith (*Pelphrey*, 547 F.3d at 1281) that would be tantamount to prohibited viewpoint discrimination against private speakers.

The Town's broad invitation to religious leaders in the community is comparable to the policies examined in *Pelphrey, Simpson, Rubin, Atheists of Fla.*, and *Joyner*. Commissioners in *Pelphrey* randomly selected "volunteer leaders of different religions, on a rotating basis, to offer invocations with a variety of religious

expressions." *Pelphrey*, 547 F.3d at 1266. In *Simpson*, Chesterfield County sent letters "designed to foster widespread participation" and scheduled speakers on a first-come, first-serve basis. *Simpson*, 404 F.3d at 279. In *Atheists of Fla.*, city officials combed the Yellow Pages, the internet, and other sources to identify places of worship and extend a broad invitation. *Atheists of Fla.*, 713 F.3d at *37. The city clerk in *Rubin* and the Forsyth County Commissioners in *Joyner* compiled similar comprehensive lists. *Rubin*, 710 F.3d at 1089, 1098; *Joyner*, 653 F.3d at 343. These procedures strongly suggest a forum for diverse private expression.

This Court has articulated a three-step framework to analyze restrictions of private speech on government property—classify the speech, identify the forum (public or nonpublic), and then evaluate the reasons for exclusion. *Cornelius v. NAACP Legal Defense and Ed. Fund, Inc.*, 473 U.S. 788, 797 (1985). The government may designate a place or channel of communication as a public forum, either for the public at large, or for use by certain speakers and/or discussion of certain topics. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983); *Cornelius v. NAACP*, 473 U.S. at 802. Speakers cannot be excluded absent a compelling state interest—and never to suppress the speaker's viewpoint. *Perry*, 460 U.S. at 46; *Cornelius v. NAACP*, 473 U.S. at 799. Government may also open a more limited "nonpublic forum." Here, access is restricted on the basis of subject matter (invocation) and speaker identity (local religious leaders), but the forum must be viewpoint neutral and restrictions reasonable in light of its purpose. *Id.* at 806. Some cases have used the term "limited public forum," but again, viewpoint discrimination is an "egregious form of content

discrimination" that is impermissible. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-830 (1995); *Lamb's Chapel*, 508 U.S. at 390. The government "must respect the lawful boundaries it has itself set." *Rosenberger*, 515 U.S. at 829.

The Town's policy is consistent with principles governing private expression in a government-created forum. Its restrictions on the speaker (local religious leaders) and topic (invocation) are both reasonable in light of the general purpose for legislative prayer—to "solemnize the weighty task of governance." *Joyner*, 653 F.3d at 347. Inviting a religiously diverse group of volunteers to pray, and using a list compiled from various public sources, the policy avoids the impermissible viewpoint discrimination that could result from a mandatory nonsectarian policy. The Town merely confines the forum "to the limited and legitimate purposes for which it was created." *Cornelius v. NAACP*, 473 U.S. at 806; *Perry*, 460 U.S. at 49. Additional scrutiny of the content would impermissibly "raise the specter of government censorship to ensure that all [invocations] meet some baseline standard of secular orthodoxy." *Rosenberger*, 515 U.S. at 844.

IV. THE GOVERNMENT IS NOT REQUIRED TO EJECT RELIGION FROM THE PUBLIC SQUARE.

Lemon has sparked demands for a radical "neutrality" that restricts liberty rather than preserving it. But "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the

Constitution." *Salazar v. Buono,* 130 S. Ct. 1803, 1818 (2010), quoting *Lee v. Weisman,* 505 U.S. at 598. Although *Galloway* does not expressly prohibit legislative prayer, its muddled standard subjects government entities to an unreasonably high risk of litigation and thus tends to discourage the practice.

The Religion Clauses are complementary sides of the same coin. Together they form a shield guarding religious liberty from government intrusion. Courts misinterpret the purpose and application of the Establishment Clause when they strike down time-honored practices that merely encourage liberties the Constitution protects. Objectors are free to disregard public acknowledgments of the nation's religious heritage but have no iron-clad right to be free of all exposure to such references. A more principled approach to these two clauses would focus on whether liberty is threatened by the challenged practice.

The First Amendment does not require this Court to purge the public square and sever America from its religious roots. *Salazar v. Buono*, 130 S. Ct. at 1818 ("The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society."). *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring) ("[T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious."). On the contrary, the blurry "wall" between church and state should not be so high and thick that government callously disregards religion. Americans "are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. at 313. This Court has consistently rejected an absolutist

approach (*Lynch v. Donnelly*, 465 U.S. at 678), refusing "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Walz v. Tax Comm'n*, 397 U.S. at 671.

A. No One Has An Absolute Right To Be Free *From* Religion.

The Religion Clauses were designed to prevent an established national church like the Church of England, controlled and funded by government, and to prohibit governmental preference for any one Christian sect. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815). In the "crucible of litigation," modern courts have acknowledged "the right to select any religious faith or none at all." *Wallace v. Jaffree*, 472 U.S. 3, 52-53 (1985); *see also Allegheny*, 492 U.S. at 590. No one is compelled to affirm a belief, practice a religion, or financially support a church. "[L]eaders in this Nation cannot force us to proclaim our allegiance to *any* creed, whether it be religious, philosophic, or political." *Elk Grove v. Newdow*, 542 U.S. at 44 (O'Connor, J., concurring).

But the First Amendment grants heightened protection to *religious* faith, "too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, 505 U.S. at 589. The corollary is not true in every respect. Nonbelievers are entitled to deference, but the Religion Clauses protect *religion*. *Id.* at 589. They were "written by the descendents of people who had come to this land precisely so that they could practice their religion freely." *McCreary*, 545 U.S. at 881. Government may neither compel nor prohibit religious

exercise. "[T]he Constitution's authors sought to protect religious worship from the pervasive power of government." *Lemon v. Kurzman,* 403 U.S. at 623. It frustrates this purpose—*to protect religion*—to erase it in the public realm.

No one can escape offense:

> [T]he Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory.

Elk Grove v. Newdow, 542 U.S. at 44 (O'Connor, J., concurring). Exposure to unwelcome ideas is the price of preserving American freedoms. Americans must "develop thicker skin." David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223, 245 (2003).

The Establishment Clause has sparked many fractured opinions, but this Court recently denied that "irreligion" is always on a par with religion:

> Despite Justice Stevens' recitation of occasional language to the contrary...we have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion.

Van Orden v. Perry, 545 U.S. at 684 n. 3. Justice Scalia's *McCreary* dissent foreshadows this

pronouncement. "With all of this reality (and much more) staring it in the face, how can the Court *possibly* assert that 'the First Amendment mandates governmental neutrality between . . . religion and nonreligion....' Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words." *McCreary,* 545 U.S. at 889 (Scalia, J., dissenting) (citing majority opinion, *id.* at 875-876).

B. Legislative Invocations Have No Coercive Impact—The Hallmark Of Historical Establishments.

Legislative prayer respects the observer's autonomy to embrace, reject, or ignore another person's expression. In *Marsh*, the *dissent* highlighted coercion. Legislative prayer allegedly "intrudes on the right to conscience by forcing some legislators...to participate in a 'prayer opportunity'" and "forces all residents of the State to support a religious exercise that may be contrary to their own beliefs." *Marsh v. Chambers,* 463 U.S. at 808 (Stevens, J., dissenting). The "coercion" in *Marsh* is far removed from the penalties of historical establishments. *Marsh* respects liberty on both sides—the conscience of the speaker and the observer's freedom to respond. The *Marsh* approach is objective, in contrast to the highly subjective *Lemon* and endorsement tests that have spawned lawsuits and splintered court rulings over their relatively short lifespan.

This Court has long recognized the link between the Religion Clauses and governmental compulsion. The Establishment Clause "forestalls compulsion by law of

the acceptance of any creed or the practice of any form of worship." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). In contrast to such oppression, legislative invocations are "rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular." *Lee v. Weisman*, 505 U.S. at 630. "The coercion that was a hallmark of historical establishments...was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Van Orden v. Perry*, 545 U.S. at 693 (Thomas, J., concurring), citing *Lee v. Weisman*, 505 U.S. at 640 (Scalia, J., dissenting) (emphasis in original). Legislative invocations do not place "the power, prestige, and financial support of government behind a particular religious belief." *Engel v. Vitale*, 370 U.S. at 431.

C. Government May Acknowledge And Even Benefit Religion.

Public acknowledgments of religion—through passive displays, presidential proclamations, and invocations of divine guidance—pose no threat to liberty and are consistent with both Religion Clauses. In fact, the government's role in preserving religious liberty creates a tension with the first two prongs of *Lemon*. Where government actively facilitates religious liberty, it may have not a purely "secular" purpose and could be accused of "advancing" religion. But such action is entirely consistent with America's history and Constitution.

Legislative prayer is "a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh v. Chambers*, 463 U.S. at 792. This is

unremarkable because "a vast portion of our people believe in and worship God and...many of our legal, political and personal values derive historically from religious teachings." *Abington Sch. Dist. v. Schempp,* 374 U.S. 203, 306 (1963) (Goldberg, J., concurring, joined by Harlan, J.). Government may accommodate and even offer benefits to facilitate religious freedom: *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483* U.S. 327, 338 (1987) (religious employers exempt from religious discrimination law); *Walz v. Tax Comm'n,* 397 U.S. at 673 (church property tax exemption); *Zorach v. Clauson,* 343 U.S. at 308 (public school students allowed time off-campus for religious instruction).

Striking down legislative prayer or imposing *Galloway's* unattainable standard would convey the message that government is determined to erase public recognition of America's religious roots—contrary to this Court's caution that "[t]he goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm." *Salazar v. Buono*, 130 S. Ct. at 1818.

CONCLUSION

The Second Circuit decision strays far from this Court's precedent. Its bewildering double-speak creates an unworkable, precarious standard that will strangle religious expression in the public square, contrary to decades of established American tradition. This Court should reverse this deeply flawed decision.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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TOWN OF GREECE,
Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici are scholars who teach and write in the field of church-and-state.[1] Andrew M. Koppelman is the John Paul Stevens Professor of Law at Northwestern University School of Law. Carl H. Esbeck is the R.B. Price Professor and Isabelle Wade & Paul C. Lyda Professor of Law at the University of Missouri School of Law. Paul Horwitz is the Gordon Rosen Professor of Law at the University of Alabama School of Law. Thomas C. Berg is the James L. Oberstar Professor of Law and Public Policy at the University of St. Thomas School of Law (Minnesota). William P. Marshall is the William Rand Kenan, Jr. Distinguished Professor of Law at the University of North Carolina School of Law.[2]

Amici come from a variety of backgrounds and have a variety of perspectives. Some of us identify as Democrats; others of us identify as Republicans. Some of us are religious believers; others of us are not. On other issues pertaining to religious liberty, *amici* disagree profoundly. But on the issue of legislative prayer, and this Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), *amici* are agreed.

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[1] Counsel for *amici* certifies that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Letters of consent from both parties to the filing of this brief have been filed with the Clerk.

[2] *Amici* file this brief in our personal capacities as scholars. None of our respective universities takes any position on the issues in this case.

SUMMARY OF ARGUMENT

Thirty years ago, this Court called legislative prayer "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). Even at the time, this did not capture the whole story. And the past thirty years have given cause for further doubt. *Marsh* saw, and accepted, the costs that legislative prayer imposed on nonbelievers. But the past thirty years have demonstrated how legislative prayer entails other kinds of costs—on religious believers and on our body politic—that would have been hard for *Marsh* to anticipate.

Some of these costs will be familiar to the Court from the briefs here and the cases they cite—listeners having to endure their government advancing religious views they reject, speakers having to face exclusion for being religious minorities. But the decided cases only tell part of the story. At its root, the problem with legislative prayer is that it commits the government to making an unparalleled number of religious choices: Inevitably government will have a dangerous degree of discretion over who gets to pray, what they will be allowed to say, and the penalties for nonconformists. Each decision is, unavoidably, a decision about religious truth—about what God wants to hear, and who God wants to hear from.

And because these choices are not static, they become the subject of ordinary politics, with ugly sorts of religious campaigning and religious voting as the inexorable result. These consequences are almost an academic case study in what can happen when the government is permitted to take religious positions, but these are not hypotheticals devised by

law professors. For even the most well-intentioned public officials, the drafting and execution of prayer policies has sown discord and division. *Amici* write to inform this Court of these on-the-ground developments, of controversies both historical and recent, so that they do not go overlooked.[3]

In urging this Court to accept legislative prayer thirty years ago, the government made this claim: "[H]istory tells us that legislative prayers do not represent any realistic potential for the kind of strife the Establishment Clause was intended to prevent, because no such strife has ever surfaced as a result thereof." Petitioners' Brief at 16, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-23). Even at the time, this statement was too quick; it glossed over a number of things, including some darker aspects to the history of the congressional chaplaincies. But time has ravaged it even more. Thirty years of history have demonstrated, better than any dissent ever could, the constitutional dangers that develop when the government prays.

In *Marsh*, the government argued that one can recognize trees by their fruits. But the fruits of legislative prayer are more bitter than commonly supposed, and this suggests a terrible truth about the tree. *Amici* are certainly not the first to argue that *Marsh* should be overruled. *See* Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 363 (1988) ("[U]nless I can be

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[3] Some of the recent examples cited here were reported earlier in Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972 (2010). Some of the historical ones were discussed in Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171 (2009).

persuaded that there is some coherent understanding of the establishment clause, which can be applied consistently in the circumstances of today, I am forced to disagree with the holding in *Marsh*."). Also believing this conclusion follows from first principles, *amici* here point out how it has been reinforced by three decades' worth of hard experience.

ARGUMENT

I. LISTENERS AND LEGISLATIVE PRAYER

Of the issues spawned by this Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), the most frequently arising has been over the content of legislative prayers. The instant case bears out this point—a central part of Respondents' claim here is that the prayers are explicitly Christian, and that citizens have been coerced to join in these Christian prayers.

Both sides ground their arguments in the *Marsh* opinion. In one part of *Marsh*, seized on by Petitioner, the Court said that the prayer opportunity should not be "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-95. In another part, seized on by the Second Circuit below, the Court suggested that prayers had to be scrupulously nondenominational. *See id.* at 793 n.14 (noting approvingly that Nebraska's chaplain had "removed all references to Christ after a 1980 complaint from a Jewish legislator"); *see also County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989) (taking this language as requiring that all legislative prayers remove all Christian references).

Amici believe that Respondents have the better of this argument, *see* Respondents' Br. at 42-47, but *amici* also wish to take a wider view. Petitioner gets so caught up in exegesis that these passages from *Marsh* end up seeming like bureaucratic formalities—requirements that Petitioner must satisfy only in the most literal and technical sense. This is probably not what *Marsh* intended. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) ("[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute."). But even worse, it risks losing sight of the genuine constitutional concerns which motivated the language in the first place.

Those constitutional concerns are easily understood and universally shared. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 703 (1994) ("a principle at the heart of the Establishment Clause"). Some Justices voice disagreement with the current trajectory of the Establishment Clause, arguing for an end to the endorsement and *Lemon* tests. But on whether the government must remain neutral between religions, there is no disagreement. *See Grumet*, 512 U.S. at 748 (Scalia, J., dissenting) ("I have always believed, and all my opinions are consistent with the view, that the Establishment Clause prohibits the favoring of one religion over others."); *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J. dissenting); *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 893-94 (2005) (Scalia J., dissenting). In this Court's most recent prayer case, for example, these same Justices addressed the basic

issue presented here and concluded that an overabundance of Christian prayers would indeed unconstitutionally affiliate the government with Christianity. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 321 (2000) (Rehnquist, C.J., dissenting) (arguing that "the [student] election could lead to a Christian prayer before 90 percent of the football games," in which case the policy would raise Establishment Clause problems).

Though the iron-clad prohibition on denominational discrimination existed before *Marsh*, it also has deep roots within it. It is not just the two disputed *Marsh* quotations, as Petitioner would have it; the theme of denominational neutrality runs through the opinion and binds it together. *Marsh* accepted legislative prayer as a legitimate way of encouraging political unity and religious toleration. This is what Chief Justice Burger meant when he called legislative prayer an "acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792. It is also what Justice Scalia meant years later when he spoke of prayer as an "important unifying mechanism" for our citizenry. *Lee*, 505 U.S. at 646 (Scalia, J. dissenting). Echoing this same theme, Justice O'Connor explained how accepted legislative prayers "shared a common characteristic: they recognized the rich religious heritage of our country in a fashion that was designed to *include* members of the community[.]" *Turner v. City Council of Fredericksburg*, 534 F.3d 352, 356 (4th Cir. 2008) (O'Connor, J., retired, sitting by designation) (emphasis added). Justices differ significantly in how they see legislative prayer. *Compare Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring)

("although [legislative prayers] speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes"), *with McCreary County*, 545 U.S. at 892 (Scalia J., dissenting) (seeing legislative prayers simply as "government-led prayer to God"). So it matters deeply that they all emphasize unity as legislative prayer's organizing theme and its foundational purpose. It would be hard for lower court judges to miss these signals, and indeed they have not. *See, e.g.*, *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 (10th Cir. 1998) (en banc) ("The genre [of prayer] approved in *Marsh* is a kind of ecumenical activity that seeks to bind peoples of varying faiths together in a common purpose."); *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 287 (4th Cir. 2005) ("*Marsh* requires that a divine appeal be wide-ranging, tying its legitimacy to common religious ground."). This is not just *a* theory of legislative prayer. It has been *the* theory of legislative prayer; it was the theory upon which legislative prayer was accepted in *Marsh*.

The decided cases illustrate some of the dangers that will arise if the Court abandons course. Jews and Muslims cannot join in prayers celebrating the Virgin Birth and the Resurrection, because they do not believe those things happened. *See Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011). Songs that praise Jesus Christ can only be sung faithfully by Christians; they will make members of other religions intensely uncomfortable. *See Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006). Even attempts to broaden the circle sometimes backfire, exposing those who are truly minorities. *See* Don Davis, *Prayer Riles Minnesota House as Final Friday*

Begins, DULUTH NEWS-TRIB., May 20, 2011, *available at* 2011 WLNR 10121451 ("I know this is a non-denominational prayer in this chamber and it's not about the Baptists and it's not about the Catholics alone or the Lutherans or the Wesleyans or the Presbyterians, the evangelicals or any other denomination but rather the head of the denomination and his name is Jesus."). Of course, the principle of denominational neutrality is itself denominationally neutral. Mainstream Christian believers should not have to endure the government mocking their faith with sarcasm disguised as prayer. *See Snyder*, 159 F.3d at 1228 n.3 ("'Our Mother, who art in heaven (if, indeed there is a heaven and if there is a god that takes a woman's form), hallowed be thy name . . .'").

Here is one now well-known legislative prayer, which has been delivered at different times in various local governmental bodies and in three different state legislatures:

> We confess that [w]e have ridiculed the absolute truth of your word and called it pluralism. We have worshiped other gods and called it multiculturalism. We have endorsed perversion and called it alternative lifestyle. We have exploited the poor and called it the lottery. We have neglected the needy and called it self-preservation. We have rewarded laziness and called it welfare. We have killed our unborn and called it choice. We have shot abortionists and called it justifiable . . . We have polluted the air with profanity and pornography and called it

> freedom of expression . . . In the name of your son, the living Savior, Jesus Christ. Amen.

House Democrats Claim Prayer is 'Disrespectful', ARIZ. REPUB., Jan. 28, 2004, at B9, *available at* 2004 WLNR 23024185 (Arizona); *see also* Marc Fisher, *Stark Prayer Sparks an Absolute Political Furor*, WASH. POST, May 20, 1996, at A01, *available at* 1996 WLNR 6489017 (Kansas and Colorado). Some walked out in protest, but at least this prayer went after both sides of the political spectrum. Even more significantly, these were state legislatures. In less populated and more homogenous towns like Greece, where meetings are small and frequent, few would dare to not participate and fewer still would dare to protest. *See Wynne v. Town of Great Falls*, 376 F.3d 292, 295-96 (4th Cir. 2004) (noting how the plaintiff had been orally criticized for not participating in the town council's prayer and then barred from speaking at subsequent council meetings).

To be fair, the very worst has not happened. Imprecatory prayer may appear in the Bible, *see* PSALMS 109:8-9 ("Let his days be few, and let another take his office. Let his children be fatherless, and his wife a widow."), but legislatures have so far escaped the likes of Fred Phelps. But this may be due to *Marsh* itself, as even the narrowest reading of *Marsh* imposes limits on the content of these kinds of legislative prayers. Were this Court to remove those limits—or make the bar so high no victim could ever satisfy them—the possibilities are endless.

Of course, limits designed to protect listeners imply correlative limits on the government's speakers. Petitioner sees this as censorship. *See*

Petitioner's Brief at 41 (quoting *Lee v. Weisman*, 505 U.S. 577, 588 (1992) ("It is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.'") (citations and quotations omitted). But *Lee* cuts the other way. *Lee* saw the costs of censorship as a reason for the government not to pray at all. To follow *Lee* is to overrule *Marsh*. Petitioner never comes to terms with how *Lee* actually required more rather than less censorship; the effect was to bar the Rabbi from making any religious remarks altogether.

But the key problem with Petitioner's theory is that this is simply not private speech. *See* Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 1017 (2010) ("[L]egislative prayer is prayer by a legislature—it is government speech by definition.") [hereinafter Lund, *Secret Costs*]. Experienced jurists have found this question so easy as to merit little discussion. *See Turner v. City Council of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008) (O'Connor, J., retired, sitting by designation) (concluding this in a terse six-page opinion). The instant case is harder than some of the others. The rotating nature of the chaplaincy here gives this government speech some private aspects. But within the dichotomy of private and governmental speech, for reasons given by Respondents, it remains government speech. *See* Respondents' Br. at 54-57; *see also Rust v. Sullivan*, 500 U.S. 173 (1991). Still, even if their harm may be exaggerated, restrictions on speakers provide yet another reason why *Marsh*

should be overruled. Legislative prayer inevitably involves a trade-off between the rights of listeners to be free of denominational discrimination and the rights of speakers to pray how they wish. There is only one way out of this Catch-22.

II. PRAYER-GIVERS AND LEGISLATIVE PRAYER

Another persistent problem with legislative prayer has been the fights over the choice of prayer-givers. *Marsh* itself dealt with this issue. One specific charge leveled against Nebraska's chaplaincy was that the Presbyterian minister, Robert Palmer, had held the post for sixteen years. The Court rebuffed the claim that this was governmental support specifically for Presbyterianism. Palmer was a Presbyterian, the Court said, but that did not mean that Palmer was selected because he was a Presbyterian. *See Marsh v. Chambers*, 463 U.S. 783, 793 (1983) (saying that "the evidence indicates that Palmer was reappointed because his performance and personal qualities were acceptable to the body appointing him"). The Constitution would only be implicated if there were some "impermissible motive" in the selection process. *Id.*

This language means well, but it cannot handle the problem it purports to address. It ends up suggesting that chaplains must be chosen on a strictly religion-neutral basis. But that would be hard to imagine indeed. The congressional chaplaincies themselves provide the counterexample. When it comes to getting a job as a congressional chaplain, a Jewish rabbi almost assuredly does not stand on equal ground with a comparably credentialed mainline Protestant minister. After all, we have had more than a hundred Protestant chaplains but no Jewish ones. This is the

"inexorable zero"—as foolproof as circumstantial evidence can get. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977) (citation and quotations omitted). And surely no one believes that Wiccan and Christian ministers have equal chances of being hired as congressional chaplains.[4]

These problems remain thorny today, but they have been thorny for a long time. The First Congress required the House and Senate chaplains to be of different denominations. *See Marsh*, 463 U.S. at 793 n.13. Somewhat unsurprisingly, the Senate routinely chose Episcopalian chaplains, while the House rotated among Presbyterian, Methodist, and Baptist chaplains. Yet this was an admirable degree of diversity for a country where Protestants took their religious differences seriously.

But there were limits to Congress's inclusivity. Catholics faced widespread discrimination in American life throughout the 18th and 19th centuries, and the congressional chaplaincies were no exception. Writing in retirement in the 1820s, Madison doubted that there would ever be a Catholic chaplain, and concluded that the chaplaincies would inevitably discriminate against religious minorities. *See* Elizabeth Fleet, *Madison's "Detatched*

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[4] Allegations of denominational imbalance have also been directed at this country's military chaplaincies. *See In re Navy Chaplaincy*, __ F.Supp.2d __, 2013 WL 811462 (D.D.C. Feb. 28, 2013). Like the Court, *amici* see the military chaplaincies as entirely different from legislative ones, because of the important free exercise considerations involved. *See McCreary County v. ACLU of Ky.*, 545 U.S. 844, 875 (2005) ("[I]f the government cannot pay for military chaplains a good many soldiers and sailors would be kept from the opportunity to exercise their chosen religions.").

Memoranda," 3 WILLIAM & MARY Q. 534, 558 (1946) ("[T]o say that his religious principles are obnoxious or that his sect is small, is to lift the evil at once and exhibit in its naked deformity the doctrine that religious truth is to be tested by numbers, or that the major sects have a right to govern the minor.").

Of course, on the narrow issue, Madison turned out to be wrong. In 1832, the Senate nominated a Roman Catholic priest, Charles Constantine Pise, to be the first Catholic congressional chaplain. *See* JOURNAL OF THE SENATE, 22d Cong., 2d sess., Dec. 11, 1832, at 25; 9 REG. DEB. 5-6 (Dec. 11, 1832).

Pise's election caused an uproar. Nineteenth century Protestants did not see Catholics as their Christian brothers. They saw Catholicism as a rival, and thoroughly corrupt, religion. One Pise biographer wrote of the "intense anti-Catholic feeling and bigotry [in] press and pulpit . . . alike" at the time of Pise's nomination, and described how "[t]he thought of a Catholic priest holding such a position of honor in the Senate of the United States called forth strenuous efforts to prevent this 'disaster' to the Republic." Sister M. Eulalia Teresa Moffatt, *Charles Constantine Pise* (1801-1866), in 20 HISTORICAL RECORDS AND STUDIES 75, 78 (Thomas F. Mechan ed., 1931); *see also* Charles H. Whittier, *The Only Roman Catholic Chaplain of the United States Senate*, CONG. RES. SERV., Mar. 27, 1986, at 1 (noting that "nativists and anti-Catholic elements . . . regarded Catholicism as involving a dual allegiance (to the United States and to the Holy See)" and thus they, as a result, "bitter[ly] campaign[ed] against [Pise]").

These objections did not stop with Pise's election. Congress began receiving petitions to end the chaplaincies; and in apparent protests, Protestant chaplains in state legislatures refused to offer prayers. *See* Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171, 1189 nn. 89 & 90 (2009) [hereinafter Lund, *Congressional Chaplaincies*]. On Independence Day 1833, Pise spoke out publicly to try and pacify the anti-Catholic forces arrayed against him. *Id.* at 1189-90. But at the end of that year, for unknown reasons, the Senate rejected Pise (who sought re-election) and chose an Episcopalian chaplain instead. *See* 10 REG. DEB. 27 (Dec. 10, 1833).

Pise went away, but the issue he sparked did not. Throughout the 19th century, Protestants came to oppose the congressional chaplaincies because of the fear that they would again fall in Catholic hands. *See* Lund, *Congressional Chaplaincies*, at 1190-91 & nn. 93-101. *Marsh* noted how the chaplaincies were suspended in the 1850s, *see Marsh*, 463 U.S. at 788 n.10, but it noted neither the reasons for that opposition nor their intensity, *see* Lund, *Congressional Chaplaincies*, at 1196-97 & nn. 126-27.

Perhaps the most telling indication of how anti-Catholicism affected the chaplaincies is this. Charles Constantine Pise was the first Catholic congressional chaplain, leaving office at the end of 1833. It would not be for another 167 years—until the year 2000—that either the House or the Senate would hire another Catholic as a congressional chaplain. That decision too was racked by controversy. The House committee had agreed upon

Rev. Timothy O'Brien, a Catholic priest. But the leadership in the House rejected the committee's decision, and chose a Protestant. One Catholic bishop publicly objected to the questions the House asked of O'Brien, seeing them as "questions rooted, if not in anti-Catholicism, at least in a denominational bias." David Waters, *Is There an Anti-Catholic Bias Afoot in the Halls of Congress?*, STUART NEWS (FLA.), Feb. 26, 2000, at D6, *available at* 2000 WLNR 7551920. Representative Henry Hyde publicly accused his Republican colleagues of partiality. *See* Steve Neal, *No Room for Politics in This Pulpit*, CHI. SUN-TIMES, Mar. 16, 2001, at 35, *available at* 2001 WLNR 13124467) (statement of Rep. Hyde) ("I hate to think it is anti-Catholic bigotry, but I don't know what other conclusion to draw."). O'Brien ended up telling the *New York Times*, "I do believe that if I were not a Catholic priest I would be the House chaplain." Alison Mitchell, *Rancor in House on Choice of a Chaplain*, N.Y. TIMES, Dec. 2, 1999, at A32, *available at* 1999 WLNR 3016126. The House eventually took neither O'Brien nor Wright. It asked Cardinal Francis George for recommendations, and he suggested the current House chaplain. *See* Neal, *supra*.

The point here is not to accuse Congress of misbehavior, but instead to say that legislatures inevitably will tend to prefer chaplains of their own religious denominations, because legislators are inevitably drawn to clergy who share their religious beliefs and values. This is perfectly natural. It explains why Congress waited so long to have another Catholic chaplain, even though anti-Catholicism had begun to fade significantly earlier. It explains why, throughout our history, we have

only had Christian chaplains. In fact, in a bizarre way, the congressional chaplaincies tell an interesting story about the perceived boundaries of Christianity. Unitarianism used to be thought of as a Christian denomination, and in the 19th and early 20th century we had Unitarian congressional chaplains. But Unitarianism is no longer thought of that way (even by Unitarians), and we no longer have Unitarian chaplains. *See* Lund, *Congressional Chaplaincies*, at 1193-96.

And, of course, not only has Congress never had a non-Christian chaplain, it has never had a female chaplain either. It is obvious why. For Congress to hire a female clergyperson to pray on behalf of the government would imply governmental approval of female clergy, and many well-established religious denominations do not ordain women. Sexual orientation is a similar but different issue, because mainline religious denominations have only recently begun to ordain gay clergy. But it has come up. Oklahoma's legislature recently moved to retroactively strike from the record the prayers of a minister who mentioned his homosexual partner before beginning to pray. *See* Michael McNutt, *Gay Pastor Irks Critics Before Offering Prayer*, OKLAHOMAN, Feb. 12, 2009, at 14A, *available at* 2009 WLNR 2867665. When the government accepts gay ministers as chaplains, it implies that gays and lesbians can be clergy in the government's eyes. But disestablishment requires the government to stay out of the inherently religious debates regarding fitness for ministry. *See Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694 (2012).

There is an important difference here between Congress and state legislatures on the one hand, and local governments on the other. When Congress and state legislatures choose institutional chaplains, they do so infrequently and usually through a highly secretive selection process. This lack of transparency obscures discrimination, thus reducing feelings of alienation: The fact that Palmer held his position as chaplain for sixteen years meant that, for sixteen years, there were no fights over who would pray. But as local governments have opened up the prayer opportunity, acts of discrimination have been more common. One Fourth Circuit case involved a Wiccan clergyperson who signed up to give a prayer at a county board meeting and was sent a letter saying that the county did not want Wiccans. *See Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 280 (4th Cir. 2005). An Eleventh Circuit case involved a County Clerk that invited clergy from local congregations. The Clerk used a phone book to find them. When that phone book was turned over in discovery, it was revealed that the Clerk had crossed out certain sections of the phone book, thus excluding Islamic, Jewish, Mormon, and Jehovah's Witness congregations. *See Pelphrey v. Cobb County*, 547 F.3d 1263, 1267-68 (11th Cir. 2008). Perhaps there are other similar cases, but these kinds of allegations are extraordinarily difficult to prove. In *Pelphrey*, the county documented, and then preserved, evidence proving its discrimination; in *Simpson*, the county actually mailed that evidence to the plaintiff. In the average run of cases, plaintiffs will have an impossible time proving discrimination—especially when defendants begin to recognize the need to be more discreet.

III. POLITICS AND LEGISLATIVE PRAYER

Legislative prayer differs fundamentally from issues considered in this Court's other recent Establishment Clause cases—like the constitutionality of Ten Commandments displays, *see McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005), or the phrase "under God" in the Pledge of Allegiance, *see Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). Part of it is that those cases involved mixed messages. The Ten Commandments have moral as well as religious force, *see Van Orden*, 545 U.S. at 701 (Breyer, J., concurring) ("communicates not simply a religious message, but a secular message as well"), and the Pledge sounds in patriotism as much as religion, *see Newdow*, 542 U.S. at 6 ("a patriotic exercise designed to foster national unity and pride"). But this Court could not recast prayer along such lines; it would be offensive and unconvincing at the same time. Prayer is intrinsically religious, if anything is.

But there is a second difference with just as much explanatory power. Legislative prayer requires more governmental involvement—it vests the government with more discretion to make religious decisions—than either Ten Commandments displays or the Pledge. No one wants to change the text of the Ten Commandments or rewrite the Pledge. Governments will have to decide whether to have a Ten Commandments display; public schools will have to decide whether to say the Pledge. But those operate more like simple up-or-down votes. There is no debate over the merits and demerits of particular theological views. And there are no fights over who gets to send the message. The Pledge is

said by everyone together; the message conveyed by a Ten Commandments display is delivered by no one in particular.

By contrast, legislative prayer requires the government to make a number of religious choices—not just whether to have legislative prayer, but how often, for how long, and so on. The first involves who will be given the platform to pray. Sensitive people will try to be as neutral as possible—by, say, inviting clergy from all religious denominations. Even this is not entirely religion-neutral, of course. Some religions are too small locally to have local clergy; others are theologically opposed to having clergy. *See* Lund, *Congressional Chaplaincies*, at 1204 n.168 (noting that Quakers and Mennonites, lacking ordained clergy, have not participated in the congressional chaplaincies).

But a larger problem lies in the temptation to play favorites. It is deeply unnatural to let minority believers give prayers that few people in the audience want to hear. *See, e.g.*, Shawn Vestal, *Prayer Vote Averts an Unlikely Clash of Faiths,* SPOKESMAN-REV. (SPOKANE, WASH.), June 29, 2011, at 5A, *available at* 2011 WLNR 12912079 ("I would plainly ask: Do you want to invoke the name of another god, whether it is Satan, a set of Wiccan gods or any other? It would be a tragedy to see our government resort to calling upon Satan or any number of other idols for guidance."). And elected officials are the ones making these decisions; letting the Wiccan pray will come with political consequences. *See* Lynne Bumpus-Hooper, *Davis Quitting Over Prayer Furor*, ORLANDO SENTINEL, Mar. 13, 1996, at D1, *available at* 1996 WLNR 5307777 (discussing a city council member who quit

over the backlash from her decision allowing a Wiccan to pray).

A second issue relates to content. Prayer comes in all forms, and there are innumerable lines that a legislature could draw. A legislature could entirely fix the content of the prayer; it could specify, for example, that sessions will open with the Lord's Prayer or the Pledge of Allegiance. It could offer nonbinding suggestions to speakers, it could require explicit pre-approval of prayers, or it could say nothing at all. There are any number of lines to draw, and any number of ways of implementing those lines.

Not only will local governments have to establish limits, they will sometimes be forced to decide penalties. Prayer-givers might cross the line. *See, e.g.*, Rob Johnson & Mason Adams, *Prayer Debate Swirls in Roanoke*, ROANOKE TIMES, Jan. 11, 2009, at A1, *available at* 2009 WLNR 646416 (noting that after an invited clergymember made devotional references to Jesus Christ in his prayers, one city councilman called it "a slap in our face and nothing we agreed to and is leading us down a road we have not agreed to"); Don Davis, *Prayer Riles Minnesota House as Final Friday Begins*, DULUTH NEWS-TRIB., May 20, 2011, *available at* 2011 WLNR 10121451 ("I respectfully apologize . . . for today's morning prayer. As Speaker of the House, I take responsibility for this mistake. I am offended at the presence of [the guest chaplain] Bradlee Dean . . . I denounce him, his actions and his words."). Audience members too will break the rules. In Alabama, a Unitarian Universalist offered a thoroughly nondenominational prayer only to be interrupted by someone praying over her. *See* Kay Campbell, *Meeting Spiritual*

Needs, HUNTSVILLE TIMES, May 23, 2008, at 1B, *available at* 2008 WLNR 13689842. A few years ago, the Senate invited a Hindu guest chaplain, who was interrupted by protestors in the balcony who were subsequently arrested. *See* Lund, *Congressional Chaplaincies*, at 1205-06.

These choices are judgments about religious truth. When the government decides who prays, it decides which religion or religions are true—or at least which are close enough to the truth to merit inclusion. The same is true when the government decides the boundaries of permissible prayers. Barring proselytizing prayers makes sense if God sees all religions as having equal value and sees none as being worthy of condemnation. But barring proselytizing prayers makes less sense if one's neighbors might really be on a wrong theological course and could potentially suffer eternal consequences as a result. *See* Lund, *Secret Costs*, at 1043 (similar phrasing).

And because these decisions are neither static nor inevitable, they bleed naturally out into politics. Here is a newspaper article about a 2009 election in a small North Carolina town:

> Yadkin voters booted out incumbent commissioners Kim Clark Phillips and Joel Cornelius in the Republican primary last week as part of a backlash over the board's decision to drop sectarian prayer from meetings, residents said . . . . Of all the changes [the two commissioners introduced], last year's vote to limit prayer brought on the strongest attacks . . . . Voters began organizing against Phillips and Cornelius more than a year ago after a prayer rally in

> Yadkinville that drew more than 2,500 people in support of opening meetings with Christian prayers. "Once we realized that we had some commissioners who were going to basically ignore a major conservative voting bloc, we began from that day to let our voice be heard at the voting," said Bruce Freeman, the pastor of Peace Haven Baptist Church. "I think they paid the price for not heeding the concerns of the voters." Days before the primary, advertisements ran in newspapers in Elkin and Yadkinville that promoted Wooten as the only commissioner to stand up in support of sectarian prayer . . . . But some people in Yadkin County say that voters also had the jail issue on their minds when they went to the polls.

Sherry Youngquist, *Issues Led to Defeat of Yadkin Officials*, WINSTON-SALEM J., May 11, 2008, *available at* 2008 WLNR 8869993. That last line is telling; the reporter apparently felt it necessary to add that at least some voters may have considered something other than the legislative prayer issue in casting their ballots.

That this happened even once is extraordinary, but it is no freak occurrence. *See, e.g.*, *Commissioners Go Behind Closed Doors to Pray*, SALISBURY POST (SALISBURY, N.C.), Aug. 6, 2013, *available at* 2013 WLNR 19343575 ("'This judge didn't elect you. The ACLU didn't elect you. We the people elected you,' Ford said. 'If we don't like what you're doing we can go to the ballot box next year and change that.'"); Nick G. Maheras, *Prayer Issue Revisited*, HIGH POINT ENTERPRISE (N.C), Oct. 30,

2008, *available at* 2008 WLNR 20700493 ("Area Christian ministers met Monday to discuss the High Point City Council prayer issue and Tuesday's upcoming election."); Nick G. Maheras, *Prayer Issue Leaves Spotlight*, HIGH POINT ENTERPRISE (N.C), July 7, 2008, *available at* 2008 WLNR 12709775 ("Council has failed to represent what I consider to be the majority in this city. I hope, at election time, that would manifest itself."); Tom Steadman, *Council Votes on Prayer*, GREENSBORO NEWS & REC., July 17, 2007, at A1, *available at* 2007 WLNR 13681870 (explaining that after a council decision to allow only nonsectarian prayers, one minister "critical of the council vote, ended his comments with a political threat . . . 'We're going to remember in 2008,'" which was followed by a "loud standing ovation").[5]

This, in turn, leads to religious campaigning. One California town was considering possible restrictions on overly denominational prayers when it received a letter from a citizens' group, which threatened to purchase billboard space on nearby highways. The billboards would publicly display each council member's vote as being "For Jesus" or "Against Jesus." Maggie Creamer, *Group Threatens to Display on Billboards How Council Members Vote on Invocation*, LODI NEWS-SENTINEL, Sept. 29, 2009, *available at* 2009 WLNR 19276788. A recent Ninth

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[5] To be clear about what *amici* argue: Political divisiveness alone does not warrant striking something down, but the political division here is being generated by the government taking sides in live religious disputes. That is what the Constitution forbids. *See McCreary County v. ACLU of Ky.*, 545 U.S. 844, 863 (2005) (arguing that constitutional difficulties exist when the government makes "a divisive announcement that in itself amounts to taking religious sides").

Circuit case involved a referendum which asked the voters to decide whether the City Council should continue its policy allowing prayers to refer to Jesus Christ. Twelve thousand votes were cast—seventy-six percent in favor of allowing references to Jesus, twenty-four percent opposed. *See Rubin v. City of Lancaster*, 802 F.Supp.2d 1107, 1109 (C.D. Cal. 2011) (upholding the policy and practice), *aff'd*, 710 F.3d 1087 (9th Cir. 2013).

No one believes that *Marsh* intended these consequences, but all of them are logical and inevitable outgrowths of the decision. When the government takes positions on religious issues, people will want the government to adopt their views. They will campaign for their religious positions; they will vote for them; they will lobby for them. All of this may be perfectly natural, but it goes against the old wisdom that matters of religion "may not be submitted to vote; they depend on the outcome of no elections." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); *cf. Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) (the government cannot "entrust[] the inherently nongovernmental subject of religion to a majoritarian vote").[6]

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[6] Of all the Court's opinions, it is the *Santa Fe* dissenters that most clearly recognized and feared these consequences. *Santa Fe* involved public high school football games, where winners of student elections were free to offer prayers over the public address system. The *Santa Fe* dissenters disagreed with the majority's conclusion that these elections would inevitably become referendums on religion and prayer. But they also made clear that if that happened, it would be a constitutional problem. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 321 (2000) (Rehnquist, C.J., dissenting) (arguing that "the

CONCLUSION

When *Marsh* was decided thirty years ago, it would have taken extraordinary powers of foresight to anticipate what would happen with legislative prayer. Few could have predicted the controversies, both constitutional and political, that legislative prayer would generate. *Marsh* recognized legislative prayer as *sui generis*, and it indeed has created unique kinds of problems. Yet all these problems flow from a single source: The extensive set of religious choices that legislative prayer requires the government to make. "Each choice marginalizes the religious segment that disagrees with it; each choice invites a struggle for future control of it; each choice furthers religious division along political lines. *Marsh* has committed us to a second-best theory of religious liberty. It would be better if it were overruled." Lund, *Secret Costs*, at 1049.

Yet *amici* understand that the Court, bound by principles of *stare decisis* and perhaps attracted to the passive virtues, may be hesitant to overrule *Marsh*. If this Court decides to preserve *Marsh*, it should not expand it beyond its current boundaries—beyond federal and state legislative chaplaincies. *Marsh* now operates as an exception to the central thrust of the Establishment Clause, an exception necessarily implied by the history of the congressional chaplaincies. But any exception to constitutional principle necessarily implied by

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[student] election could lead to a Christian prayer before 90 percent of the football games," in which case the policy would raise Establishment Clause problems). Religious campaigning was impermissible, the Chief Justice said, and would have to be resolved by either ending the elections or by "reasonable campaign restrictions." *Id.* at 321.

history should be only as wide as that history necessarily implies.

Writing in retirement, Madison regretted the congressional chaplaincies and called them unconstitutional. But he also doubted that they would be reversed. Nevertheless, he insisted they not be considered a "legitimate precedent," arguing that instead:

> [I]t will be better to apply to it the legal aphorism de minimis non curat lex [the law does not bother with trifles] or to class it cum maculis quas aut incuria fudit, aut humana parum cavit natura [a few blots which a careless hand has let drop or human frailty has failed to avert].

Elizabeth Fleet, *Madison's "Detatched Memoranda,"* 3 WM. & MARY Q. 534, 558-59 (1946).

Amici believe that Madison was doubly right. *Marsh* should not survive, but if it does, it should not be allowed to swallow the Establishment Clause. The battles over legislative prayer have burned brightly, but legislative prayer remains a quite narrow topic. *Amici* fear what would happen if the fires were to spread. For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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September 23, 2013

AMICUS CURIAE BRIEF

No. 12-696

In the Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

The League of California Cities (the League) is an association of 467 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee (the Committee), comprised of 24 city attorneys from all regions of California. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The League's intent as *amicus curiae* is to provide the Court with the perspective of local legislative bodies that choose to open their public meetings with a prayer as upheld in *Marsh v. Chambers*, 463 U.S. 783 (1983). The League takes no position as to whether local legislative bodies should or ought to incorporate prayers in their meetings. But those bodies that opt to do so should be provided with clear guidance from this Court as to how to adopt and implement a

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

constitutional prayer policy or practice. The Second Circuit's *ad hoc* approach in this case provides no such guidance. In a recent survey conducted on behalf of a League member, 212 of 400 California cities indicated that they currently have a formal prayer policy or informal prayer practice. The League has an interest in its member cities having the discretion to adopt and implement an invocation policy pursuant to *Marsh*, free from the constant threat of litigation inherent in the Second Circuit's standard. For that reason, the League urges the Court to reverse the Second Circuit ruling and adopt the standard for constitutionally valid legislative invocations articulated by the Ninth Circuit in *Rubin v. City of Lancaster*, 710 F.3d 1087 (9th Cir. 2013). *See also Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008). The Ninth Circuit standard remains true to *Marsh* and provides clear guidance as to how a legislative body may lawfully adopt and implement a prayer policy if it chooses to do so.

SUMMARY OF ARGUMENT

More than three decades ago, this Court held in *Marsh v. Chambers*, 463 U.S. 783 (1983), that opening sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country and is consistent with the Establishment Clause of the First Amendment to the United States Constitution. In so doing, this Court stated that "[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794.

The *Marsh* Court clearly distinguished between the prayer opportunity and the content of the prayer itself. That distinction provides a workable framework within which a legislative body may adopt and implement a prayer policy because providing broad access to the invocation forum is properly within a legislative body's control, while regulating the content of an invocation is not. The Second Circuit ignored this distinction, as well as the *Marsh* Court's focus on the legislative body's conduct in providing invocation opportunities rather than the content of invocations. Instead, the Second Circuit's test for legislative prayer directly conflicts with this Court's holding in *Marsh*.

Under the Second Circuit's test, the constitutionality of a legislative prayer practice is determined based upon its effect—*i.e.*, the issue is whether the identity of the speaker and the content of his or her speech would convey an official affiliation to a reasonable objective observer. From a practical perspective, this departure from *Marsh* effectively prohibits legislative prayer because it forces a legislative body to either run the risk that one religious group or message will be overrepresented and trigger an Establishment Clause violation, or engage in the constitutionally offensive practice of selecting prayer-givers based upon religious affiliation or prayer content.

The League urges the Court to reject the Second Circuit's test as constitutionally unnecessary and practically infeasible. Rather, if a jurisdiction elects to permit legislative prayer, its legislative body should be able to rely on *Marsh* and know that such practice is

constitutional as long as the legislative body does not exploit the prayer opportunity.

ARGUMENT

I. THE CONSTITUTIONALITY OF A LEGISLATIVE PRAYER PRACTICE IS DETERMINED BASED UPON THE LEGISLATIVE BODY'S CONDUCT, NOT THE CONDUCT OF PRAYER-GIVERS OR THE CONTENT OF PRAYERS.

The First Amendment to the United States Constitution, applicable to states by virtue of the Fourteenth Amendment to the United States Constitution, provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion..." (the Establishment Clause). More than three decades ago, this Court held in *Marsh* that the opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country and does not violate the Establishment Clause. *Marsh*, 463 U.S. at 792. After an extensive review and analysis of the history of legislative prayer, the Court ultimately held that legislative prayer does not violate the Establishment Clause, reasoning that:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment'

> of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among people of this country.

Id. at 792.

After holding that legislative prayer in general is constitutional, the *Marsh* Court then considered whether any of the following three specific aspects of the Nebraska Legislature's practice violated the Establishment Clause: (i) the fact that a clergyman of only one denomination (Presbyterian) was selected for sixteen years; (ii) the fact that the chaplain was paid at public expense; and (iii) the fact that the prayers were in the Judeo-Christian tradition. *Marsh*, 463 U.S. at 792-793.

The Court quickly disposed of any concern related to the chaplain's sixteen-year tenure because the evidence indicated that the chaplain was reappointed based upon his performance and personal qualities, not his religious views. *Id.* at 793. The Court also quickly disposed of any concern related to the fact that the chaplain was paid at public expense because such remuneration was grounded in historic practice initiated by the same Congress that drafted the Establishment Clause. *Id.* at 794.

Lastly, the Court disposed of any concern related to the fact that the prayers were in the Judeo-Christian tradition because, in the words of the Court, "[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or

belief." *Id.* This was true regardless of the fact that the prayers were explicitly Christian for fifteen of the chaplain's sixteen-year tenure. *Id.* at 793-94. Although the Court did observe in a footnote that the chaplain had removed all references to "Christ" after receiving a complaint from a legislator, that fact was neither material to nor mentioned in the Court's holding. The Court refused to "embark on a sensitive evaluation or to parse the content of a particular prayer" because it found that the prayer opportunity had not been exploited to proselytize or advance any one, or to disparage any other, faith or belief. *Id.* at 793 n. 14.

The plain and unambiguous holding in *Marsh* makes it clear that a plaintiff must make a threshold showing that a legislative body has exploited the prayer opportunity to proselytize or to disparage a particular faith or belief before, and as a condition precedent to, a court reviewing the content of a particular prayer. *Id.* at 794. While the *Marsh* Court did not explicitly state what constitutes exploitation of the prayer opportunity, it did provide the standard by which exploitation is determined. When the *Marsh* Court considered whether the selection of a single Presbyterian clergyman by the Nebraska Legislature for sixteen years constituted an exploitation of the prayer opportunity, it looked at the reason for the clergyman's long tenure. The *Marsh* Court found that the clergyman's extended tenure did not constitute an exploitation of the prayer opportunity because the evidence indicated that he was reappointed based upon his performance and personal qualities, not his religious views. *Id.* at 793. This necessarily means that a legislative body exploits the prayer opportunity

only if its policy, practice and/or conduct purposefully and intentionally proselytizes, advances or disparages a faith or belief.

II. THE SECOND CIRCUIT'S DECISION IS A DEPARTURE FROM *MARSH* AND IMPROPERLY REQUIRES LEGISLATIVE BODIES TO SELECT PRAYER-GIVERS BASED UPON RELIGIOUS AFFILIATION OR PRAYER CONTENT.

A. The Second Circuit's Decision Is A Departure From *Marsh*.

The Second Circuit acknowledged that "[...] *Marsh* did not employ the three-pronged test the Court had adopted, eleven years earlier, in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), for Establishment Clause cases." *Galloway v. Town of Greece*, 681 F.3d 20, 26 (2d Cir. 2012) (*citing Marsh*, 763 U.S. at 793-95). Instead, *Marsh* established that legislative prayer is constitutionally permissible—and the prayer content is of no concern to judges—unless there is evidence that the legislative body exploited the prayer opportunity to proselytize, advance or disparage a faith or belief. *Marsh*, 463 U.S. at 794. In some respects, the Second Circuit's decision remained true to *Marsh*. For example, the Second Circuit expressly stated that it did "[...] not hold that [Greece] may not open its public meetings with a prayer or invocation." *Galloway*, 681 F.3d at 33. Additionally, it expressly did not "[...] hold that any prayers offered in this context must be blandly 'nonsectarian.'" *Id.* at 33-34. The Second Circuit explained that such a requirement, in addition to

exceeding *Marsh*, risked establishing a "civic religion" of its own. *Id.*

However, the Second Circuit erred in stating: "[w]hat we do hold is that a legislative prayer practice that, however well-intentioned, conveys to a reasonable objective observer under the totality of the circumstances an official affiliation with a particular religion violates the clear command of the Establishment Clause." *Id.* at 34. According to the Second Circuit, such a situation existed in Greece because the predominance of prayers offered were associated with a particular creed. *Id.* This constituted a fundamental departure from *Marsh* because it shifted the determinative issue from whether Greece actually exploited the prayer opportunity to whether a reasonable objective observer under the totality of the circumstances would perceive an affiliation with a particular religion.

B. The Second Circuit's Decision Improperly Requires Legislative Bodies to Select Prayer-Givers Based Upon Religious Affiliation or Prayer Content.

The Second Circuit stated that it was not "[...] adopting a test that permits prayers in theory but makes it impossible for a town in practice to avoid Establishment Clause problems." *Id.* However, it also recognized that "[...] municipalities with the best of motives may still have trouble preventing the appearance of religious affiliation." *Id.* "These difficulties may well prompt municipalities to pause and think carefully before adopting legislative prayer,

but they are not grounds on which to preclude its practice." *Id.*

As a practical matter, the Second Circuit's decision gives two options to a legislative body that desires to incorporate legislative prayers in its public meetings. First, it may implement a prayer policy and practice that allows all individuals and congregations to give a prayer, and not specifically schedule prayer-givers based upon religious affiliation or prayer content. However, under the Second Circuit's holding, the legislative body would risk an unintentional constitutional violation if the content of all or a majority of prayers given were so similar that a reasonable objective observer would perceive a religious affiliation, regardless of whom the legislative body invites to participate.

This after-the-fact analysis provides no degree of practicality or certainty to the legislative body. The Second Circuit found that although Greece had accepted any volunteer prayer-giver and shown no religious animus, the town had violated the Establishment Clause. *Galloway*, 681 F.3d at 32. This holding flies in the face of *Marsh's* determination that the Nebraska Legislature had neither exploited the prayer opportunity nor violated the Establishment Clause because the same paid Presbyterian chaplain had delivered explicitly Christian prayers over a sixteen year period. The prayer practice in *Marsh* would therefore fail under the Second Circuit's reasonable objective observer test.

Under the Second Circuit's rubric, the second option available to a legislative body is to manipulate the

prayer-giver selection process and/or the content of prayers in order to ensure that a reasonable objective observer would not perceive a religious affiliation. In fact, this is the only option the Second Circuit provides to achieve any degree of insulation against Establishment Clause violations. However, this option requires a legislative body to do precisely what is forbidden by *Marsh*: exploit the prayer opportunity by selecting prayer-givers based upon religious affiliation or prayer content.

C. Selecting Prayer-Givers Based Upon Religious Affiliation or Prayer Content Is Itself Unconstitutional.

The First Amendment to the United States Constitution, which is applicable to states by virtue of the Fourteenth Amendment to the United States Constitution, provides, in pertinent part, that "Congress shall make no law ... abridging the freedom of speech ..." (the Free Speech Clause). The analytical framework for evaluating the regulation of speech on government property is known as "forum analysis." *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1098 (9th Cir. 2003) (*citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983); *Cornelius v. NAACP*, 473 U.S. 788, 800 (1985)). Under this rubric, constitutional permissibility depends on the forum in which the speech takes place: the government has little authority to regulate speech in a public forum, it has more authority to regulate speech in a limited public forum, and it has the most authority to regulate speech in a non-public forum. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 961 (9th Cir. 2011) (*citing Perry Educ. Ass'n*, 460 U.S. at 44-46).

However, the Free Speech Clause restricts only government regulation of private speech—it is wholly inapplicable to government speech. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (*citing Johanns v. Livestock Marketing Ass'n.*, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech ... is exempt from First Amendment scrutiny"); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 n. 7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression")).

Therefore, a Free Speech Clause analysis must begin with a determination as to whether private or government speech is at issue. *Pleasant Grove City*, 555 U.S. at 467. If government speech is at issue, the Free Speech Clause is inapplicable and no further analysis is necessary. *Id.* If private speech is at issue, the forum analysis must be used and the forum in which the speech takes place must be determined—*i.e.*, public forum, limited public forum or nonpublic forum. *ACLU of Nev.*, 333 F.3d at 1098. Once the forum is determined, the constitutional standard applicable to that forum must be applied in order to determine constitutionality. *Id.*

1. Legislative Prayers Constitute Private Speech For Purposes of the Free Speech Clause.

As the Free Speech Clause restricts only government regulation of private speech—not government speech—the character of the speech at issue (*i.e.*, whether it is private or government speech) must be determined at the threshold. *Pleasant Grove*

City, 555 U.S. at 467. This is determined by considering four factors (the Private Speech Factors) that differentiate between private and government speech. *Ariz. Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 964 (9th Cir. 2008). The Private Speech Factors, which were originally developed by the Fourth Circuit, include:

> (1) the central "***purpose***" of the program in which the speech in question occurs; (2) the degree of "***editorial control***" exercised by the government or private entities over the content of the speech; (3) the identity of the "***literal speaker***"; and (4) whether the government or the private entity bears the "***ultimate responsibility***" for the content of the speech, in analyzing circumstances where both government and a private entity are claimed to be speaking.

Id. (emphasis added) (*citing Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618-619 (4th Cir.), *reh'g en banc denied*, 305 F.3d 241 (4th Cir. 2002); *Wells v. City and County of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001); *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093-94 (8th Cir. 2000)). Applying the Private Speech Factors, it is clear that a prayer delivered to open a legislative body's meeting pursuant to *Marsh* constitutes private speech.

For example, in *Ariz. Life Coalition, Inc.*, 515 F.3d at 968, the Ninth Circuit held that a nonprofit organization's message displayed on state-issued specialty license plates constituted private speech. *Id.* Regardless of the fact that the state authorized

issuance of the specialty license plates, the court held that the state had not adopted as its own the messages displayed thereon. *Id.* In holding that the message displayed on state-issued specialty license plates constituted private speech, the court considered and applied each of the Private Speech Factors. *Id.* at 965-968. Specifically, the court found as follows: (i) the ***purpose*** of allowing organizations to obtain specialty license plates with their logo and motto was to provide a forum in which organizations could exercise their First Amendment rights; (ii) while the state determined whether an organization met the statutory guidelines for gaining access to the specialty license plate forum, the state did not exercise ***editorial control*** over the content of the message—the organization determined the substantive content of its message; (iii) messages conveyed through specialty license plates were primarily private speech, notwithstanding the fact that the state may have technically been the ***literal speaker***, because of the connection of any message on the plate to the driver or owner of the vehicle; and (iv) the organization, rather than the state, bears ***ultimate responsibility*** for the content of the speech because, if it wants to convey a certain message through the state's specialty license plate program, the organization must take the affirmative step of submitting an application. *Id.* at 965-968.

As in *Ariz. Life Coalition*, application of the Private Speech Factors establishes that invocations delivered at the opening of a legislative body's public meetings constitute private speech as long as: (i) the primary purpose of the legislative prayer is to open the public meetings; (ii) the legislative body exercises no editorial

control over the content of the prayers; (iii) the prayer-giver—not the legislative body—is the literal speaker; and (iv) the prayer-giver bears ultimate responsibility for the content of his or her prayer.

The first factor the Court must consider is the central purpose of the program in which the speech in question occurs. *Ariz. Life Coalition, Inc.*, 515 F.3d at 964. The "program" for the purpose of this factor is the legislative body's prayer practice specifically, not its public meetings generally. *See id.* at 965 (rejecting an argument that the purpose of specialty license plates was to identify a vehicle and its owner and instead finding that the purpose was to provide individuals "the opportunity to identify themselves with individualized messages via these specialized plates"). The purpose of legislative prayer is to continue an "[...] unambiguous and unbroken history of more than 200 years [and] there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." *Marsh*, 463 U.S. at 792. This supports a finding that legislative prayers constitute private speech.

The second factor the Court must consider is the degree of editorial control exercised by the government or private entities over the content of the speech. *Ariz. Life Coalition, Inc.*, 515 F.3d at 964. As long as a legislative body merely establishes guidelines for gaining access to the legislative prayer forum, but does not exercise any editorial control whatsoever over the content of the legislative prayers, this factor supports a finding that legislative prayers constitute private speech.

The third factor the Court must consider is the identity of the literal speaker. *Ariz. Life Coalition, Inc.*, 515 F.3d at 964. Like the specialty license plates in *Ariz. Life Coalition* (where the court found that this factor supported a finding that a message contained on a state-issued specialty license plate constituted private speech), the prayer-giver is the literal speaker. This is true regardless of the fact that the legislative body provides the forum—like the state provided the forum (*i.e.*, the specialty license plate) in *Ariz. Life Coalition*. This supports a finding that legislative prayers constitute private speech.

The fourth factor the Court must consider is whether the government or the private entity bears the ultimate responsibility for the content of the speech. *Ariz. Life Coalition, Inc.*, 515 F.3d at 964. As long as a legislative body's prayer practice provides that only those who accept an invitation or request to give a legislative prayer are scheduled to do so, each prayer-giver bears the ultimate responsibility for his or her legislative prayer. Because, like the specialty license plates in *Ariz. Life Coalition* (where the court found that the organization, rather than the state, bore ultimate responsibility for the content of the speech because, if it wanted to convey a certain message through the state's specialty license plate program, the organization had to take the affirmative step of submitting an application), such a prayer-giver has taken the affirmative step of accepting the invitation or requesting to give the prayer. This supports a finding that legislative prayers constitute private speech.

2. A Legislative Body's Public Meetings Constitute A Limited Public Forum.

Having determined that legislative prayer given prior to a legislative body's public meetings constitute private speech for purposes of the Free Speech Clause, the forum analysis must be used and the forum in which the speech takes place must be determined—*i.e.*, public forum, limited public forum or nonpublic forum. *ACLU of Nev.*, 333 F.3d at 1098. All stages of a legislative body's public meetings constitute a limited public forum. *See White v. Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990) ("...meetings, once opened, have been regarded as public forums, albeit limited ones") (*citing Madison School Dist. v. Wisconsin Emp't Relations Comm'n*, 429 U.S. 167, 175 (1976); *Hickory Fire Fighters Ass'n, Local 2653 v. City of Hickory*, 656 F.2d 917, 922 (4th Cir. 1981)); *Norse v. City of Santa Cruz*, 629 F.3d 966, 975 (9th Cir. 2010) ("the entire city council meeting held in public is a limited public forum"). "[...G]overnment entities establish limited public forums by opening property 'limited to use by certain groups or dedicated solely to the discussion of certain subjects.'" *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2984 n. 11 (2010) (*quoting Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009)).

Because legislative prayers are necessarily given within a limited public forum (*see, e.g., Norse v. City of Santa Cruz*, 629 F.3d at 975), a legislative body lawfully only would be permitted to impose restrictions that are: (i) reasonable in light of the purpose served by the forum; and (ii) viewpoint neutral. *Alpha Delta Chi-Delta Chptr v. Reed*, 648 F.3d 790, 797 (9th. Cir. 2011)

(*citing Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

3. Selecting Prayer-Givers Based Upon Religious Affiliation or Prayer Content Would Constitute An Impermissible Viewpoint-Based Restriction.

As legislative prayers are given within a limited public forum, any restriction imposed by the legislative body must be viewpoint neutral. *Id.* "Viewpoint discrimination is [...] an egregious form of content discrimination, and occurs when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction [on speech]." *Id.* at 800 (internal quotations and citations omitted). "[W]here the government is plainly motivated by the nature of the message rather than the limitations of the forum or a specific risk within that forum, it is regulating a viewpoint rather than a subject matter." *Ariz. Life Coalition, Inc.*, Inc., 515 F.3d at 972 (*citing Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 971 (9th Cir. 2002)). "One thing is clear, 'once the government has chosen to permit discussion of certain subject matters, it may not then silence speakers who address those subject matters from a particular perspective.'" *Ariz. Life Coalition, Inc.*, Inc., 515 F.3d at 972 (*quoting Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003)).

In order to satisfy the Second Circuit's reasonable objective observer test, a legislative body would be required to select prayer-givers based upon religious affiliation or prayer content in order to ensure no perception of religious affiliation. This necessarily

discriminates based upon viewpoint because it would result in the exclusion of prayer-givers from overrepresented groups as opposed to merely regulate when, where and if a legislative prayer is given. A correct application of *Marsh*, however, avoids this problem by focusing on the legislative body's conduct and not the religious beliefs of prayer-givers or the content of legislative prayers. The Ninth Circuit recently provided such an application of *Marsh* in *Rubin v. City of Lancaster*, 710 F.3d 1087 (9th Cir. 2013) *petition for cert. filed* July 17, 2013 (No. 13-89).

III. THE NINTH CIRCUIT HAS CORRECTLY APPLIED *MARSH* AND HAS REFUSED TO CONSIDER THE CONTENT OF PRAYERS OR IDENTITY OF PRAYER-GIVERS IN THE ABSENCE OF AN EXPLOITATION OF THE PRAYER OPPORTUNITY.

In a comprehensive, scholarly and insightful judicial analysis of *Marsh*, the Ninth Circuit in *Rubin v. City of Lancaster* rejected the argument that a city's prayer practice, when viewed in context, violated the Establishment Clause because the majority of prayers were Christian. *Id.* at 1097. In *Rubin*, the City of Lancaster for years had an informal practice of opening its city council meetings with a citizen-lead prayer. *Id.* at 1089. In 2009, the city adopted a formal policy that established a two-step process for soliciting prayer-givers. *Id.* First, the city clerk compiled a list of local congregations by searching the *Yellow Pages*, Internet and newspaper and consulting the local chamber of commerce. *Id.* All congregations located within the city were eligible to be on the list and the clerk made no inquiry concerning the faith, denomination or belief

of any person or congregation asking to be placed on the list. *Id.* Second, the city clerk mailed an invitation to each person or congregation appearing on the list to open a city council meeting with a prayer. *Id.* The city exercised no control over the content of prayers and no person who offered to pray had ever been turned down. *Id.* Between the date the city formally adopted its prayer policy in 2009 and the date the plaintiffs filed their complaint, twenty (or 77%) of prayers were given by Christians and each referred to Jesus by name. *Id.* at 1090.

Explicitly rejecting the reasonable objective observer test applied by the Second Circuit in this case, the Ninth Circuit explained that "[b]ypassing the reasonable observer, the *Marsh* Court instead trained its analysis not only on history but on the *government's* actions." *Id.* at 1096 (emphasis in original); *see also Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008). The Ninth Circuit concluded that "[...] the question in this case is not simply whether, given the frequency of Christian invocations, the reasonable observer of Lancaster's city-council meetings would infer favoritism toward Christianity. Rather, it is whether the City itself has taken steps to affiliate itself with Christianity." *Id.* at 1097. Responding to the plaintiffs' argument that the frequency of Christian prayers had the effect of advancing Christianity, the Ninth Circuit explained that "[t]his argument misconceives the focus of our inquiry. Whatever the content of the prayers or the denomination of the prayer-givers, the City chooses neither." *Id.* at 1098.

The Ninth Circuit correctly focused on whether the legislative body had exploited the prayer opportunity

by itself having taken steps to affiliate with Christianity. Not only is this test mandated by *Marsh*, it affords a legislative body the opportunity to adopt and implement a prayer policy without either (i) the constant risk of unintentionally violating the Establishment Clause because of the overrepresentation of a particular faith, or (ii) exploiting the prayer opportunity by selecting prayer-givers because of their religious affiliation in order to ensure diversity sufficient to convince the reasonable objective observer that the legislative body is not affiliating itself with a particular faith. In the words of the Ninth Circuit, "[t]he [legislative body] cannot control which religious congregations settle within its limits. Nor can it compel leaders of those congregations to accept its invitations." *Id.* at 1099. Ultimately, "[w]hatever the content of the prayers or the denomination of the prayer-givers, the [legislative body] chooses neither." *Id.* at 1099; *see also Pelphrey*, 547 F.3d at 1263.

CONCLUSION

The *Marsh* Court drew a clear distinction between the prayer opportunity and the content of prayer. This distinction provides a workable framework within which a legislative body may adopt and implement a constitutional prayer policy because although the prayer opportunity is within a legislative body's control, the faith of prayer-givers and the content of the prayers are not.

The Second Circuit ignored this distinction. Under the Second Circuit's test, the constitutionality of a legislative prayer practice is determined based upon its

effect—*i.e.*, whether the practice would convey an official affiliation to a reasonable objective observer. This departure from *Marsh* effectively prohibits legislative prayer because it forces a legislative body to either run the risk of an unintentional Establishment Clause violation, or engage in the constitutionally offensive practices of selecting prayer-givers based on their religious beliefs or regulating the content of their prayers.

The League urges the Court to reject the Second Circuit's test as constitutionally unnecessary and practically infeasible. Rather, a legislative body that chooses to permit legislative prayer should be able to rely on *Marsh* and know that its policy is constitutional as long as the legislative body itself does not exploit the prayer opportunity.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-696

In The
Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF NATHAN LEWIN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF NATHAN LEWIN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS[1]

As a practicing Orthodox Jew, the *amicus* obviously does not himself engage in prayer that has Christian themes or contains Christian references. Nor would the *amicus* support the constitutionality of Christian public prayer programs that coerce or

[1] Pursuant to Supreme Court Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part. No person or party other than the *amicus* has made a monetary contribution to this brief's preparation or submission. All parties have consented in writing to the filing of *amicus* briefs.

proselytize, or any form of Christian governmental expression that disparages Judaism or any other non-Christian faith.

Sectarian Christian prayer in public by a clergyman or other religious official as part of a governmental ceremony, or at the inception or conclusion of a governmental assembly, is, however, a well-ingrained American tradition that does not, in the *amicus*' view, impair religious freedom. The Establishment Clause of the First Amendment does not bar such non-coercive and non-proselytizing sincere public expression of human gratitude to a Supreme Being.

The *amicus* is an attorney who has briefed and argued orally in a number of cases before this Court that have raised issues under the Religion Clauses of the First Amendment. *E.g.*, *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994). The *amicus* is on the Adjunct Faculty of Columbia Law School and has taught for more than ten years a seminar titled "Religious Minorities in Supreme Court Litigation." The *amicus* also writes comments on church-state issues for the general public.

As a Law Clerk to Justice Harlan in this Court's 1961 Term, the *amicus* worked on an unpublished opinion written by Justice Harlan in the case of *Engel v. Vitale*, 370 U.S. 421 (1962), that concerned the New York State Regents Prayer. The *amicus* was also counsel who argued in this Court on behalf of a

prevailing party in *Allegheny County v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), a decision that was relied upon by the court below and has been invoked the parties and other *amici*.

The *amicus* has written this brief and is filing it with the Court to present points and provide material that would not, in all likelihood, be submitted by either party or by any other *amicus*.

SUMMARY OF ARGUMENT

First, honest and authentic prayer is invariably "sectarian." Prayer that is "neutral" because it lacks the unique attributes and references of a particular faith may be prayer in form, but it is not prayer in substance.

Second, although some individuals – including Jewish plaintiffs in Establishment Clause lawsuits -- have stated that they suffer "discomfort" or are "offended" by public prayer that contains Christian references, traditional Jewish sources encourage and promote prayer by Christians. We include in this *Amicus* Brief citations and summaries of these traditional rabbinic authorities.

Third, the history of legislative prayer in the United States Congress demonstrates that in a society as inclusive as the United States a constitutional mandate is not needed to enable minority faiths, including Jewish representatives, to recite prayers at public gatherings. Rabbis have delivered prayers at sessions of both the House of

Representatives and the Senate, and the content of their prayers have frequently been "sectarian." Indeed, the content of the message by the first rabbi to deliver a prayer in Congress was blatantly "sectarian."

Fourth, the personal injury suffered by an unwilling listener to distinctly Christian legislative prayer is no more than "discomfort" or "offense." Such psychic injury is inadequate to warrant restraint on speech, and it should be insufficient to restrain religious expression.

Fifth, the court below erroneously applied to the subject of legislative prayer the "endorsement" test articulated by Justice O'Connor in her opinions in *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984), and in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), for determining whether a public religious display violates the Establishment Clause. That test should not govern Establishment Clause claims generally, and should surely not determine whether sectarian legislative prayer violates the Establishment Clause.

ARGUMENT

I.

HONEST AND AUTHENTIC PRAYER IS NATURALLY SECTARIAN

Prayer is an entreaty for Divine assistance and it must, therefore, reflect the supplicant's personal

belief regarding the object of his or her prayers. Jewish prayer invokes the Biblical account of the creation of the Jewish people beginning with Abraham, Isaac, and Jacob and continuing through the delivery from Egypt, the receipt by the Jewish nation of the Torah at Mount Sinai, and the promise of the Land of Israel. These are, of course, "sectarian" references, but they are unavoidable in sincere prayer according to centuries-old Jewish tradition.

By the same token, authentic Christian prayer is customarily based on Christological references. Removing such references from Christian prayers on the ground that they are "sectarian" and may offend individuals who do not share Christian beliefs removes meaningful content from prayer and leaves text that is prayer in form, but not in substance. The Founding Fathers – many of whom were deeply religious Christians who believed in the efficacy of Christian prayer – did not intend, with the sweeping non-Establishment directive of the First Amendment, to permit only hollow "neutral" expressions of gratitude and supplication to be pronounced at public meetings.

Amicus agrees with the view expressed in an *amicus curiae* brief supporting the petition for certiorari in this case "that there can be no such thing as a religiously 'neutral' prayer and that attempts to establish a standard for a religiously 'neutral' prayer are contrary to the very concept of prayer and require that the judiciary become arbiters of a state orthodoxy – a task for which any governmental entity is ill-suited." Brief of *Amici*

Curiae Dr. Mark L. Bailey, et al., in Support of the Petition for a Writ of Certiorari, No. 12-696, p. 1. "Neutrality" diminishes prayer and reduces it to formal lip-service. The *Ethics of the Fathers* ("*Pirkei Avot*") in Chapter 2:18 instructs Jewish worshippers, "When you pray, do not make your prayer routine ('*keva*) but plead for mercy and compassion before the Omnipresent."

II.

JEWISH LAW AND TRADITION ENCOURAGES MEANINGFUL CHRISTIAN PRAYER

Contrary to common misconception, Jewish Law does not condemn Christian prayer. In fact, the opposite is true. There are Biblical references to worship by non-Jews – Noah's sacrifice after the flood (*Genesis* 8:20), Solomon's prediction on the construction of his Temple that "gentiles . . . from a distant land . . . will come and pray toward this Temple" (*Kings I* 8:41-43), and the repentance of the King and people of Nineveh in response to Jonah's prophesy (*Jonah* 3:8-9). The prophet Isaiah declared that "my house shall be called a house of prayer for all peoples." *Isaiah* 56:7.

Rabbi Moshe Feinstein (1895-1986), the universally accepted prolific Twentieth Century authority on questions of Jewish Law, declared in a responsum dated February 1, 1963, to Rabbi Sholom Rivkin (1926-2011), the Chief Rabbi of St. Louis, that gentiles are obliged to pray in time of need. He also concluded that Jewish Law does not prohibit simultaneous Jewish and Christian individual

prayer, each to his own Divine Being. *Igros Moshe, Orach Chaim* Vol. 2, pp. 196-197.

Rabbi Meir Simcha of Dvinsk (1848-1926), another prominent leader of Eastern Europe's Orthodox Jewish community, interpreted an opinion expressed by Saadia Gaon (882-942), a principal Jewish-Law authority of the Tenth Century, as declaring that non-Jews who seek Divine assistance have an obligation to pray. *Ohr Sameach, Hilchos Tefilla* 1:2.

After this Court ruled in *Engel v. Vitale*, 370 U.S. 421 (1962), that the New York State Regents Prayer was unconstitutional, the spiritual leader of the international Chabad-Lubavitch Hasidic community, Rabbi Menachem M. Schneerson, criticized the decision in a letter dated November 21, 1962. (Appendix A.) Rabbi Schneerson supported recitation of the Regents Prayer by non-Jews because of "[t]he responsibility which the Jewish religion imposes upon its adherents towards the non-Jew in the matter of dissemination of the belief in G-d."

These Jewish authorities establish that the authentic Jewish attitude towards Christian prayer is encouragement, not condemnation. Consequently, attendance at legislative prayer, even if it consists primarily of Christian references, does not violate Jewish law or custom.

III.

JEWISH LEGISLATIVE PRAYER IS FREQUENTLY "SECTARIAN"

Many legislatures, including both Houses of the Congress of the United States, have invited rabbis or Jewish lay leaders to recite invocations or benedictions during public sessions. We list in the margin the dates since 2007 on which rabbis delivered opening prayers in the House of Representatives and the Senate and the identities of the rabbis[2]:

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[2] June 11, 2013 (Senate) Moshe Feller
May 23, 2013 (Senate) Michael Beals
April 17, 2013 (House) Robert Silvers
November 29, 2012 (Senate) Baruch Frydman-Kohl
September 20, 2012 (House) Steven Weil
July 11, 2012 (House) David Algaze
July 10, 2012 (House) Joel Levinson
May 31, 2012 (House) Aaron Melman
February 7, 2012 (House) Jeffrey Astrachan
November 2, 2011 (Senate) Lord Jonathan Sacks
September 15, 2011 (Senate) Leslie Gutterman
May 24, 2011 (House) Jeremy Wiederhorn
April 5, 2011 (House) Efrem Goldberg
June 16, 2010 (House) Joshua Davidson
May 5, 2010 (House) Dov Hillel Klein
January 27, 2010 (House) Gil Steinlauf
October 28, 2009 (House) Jacob Luski
July 22, 2009 (House) Stephen A. Leon
June 25, 2009 (Senate) Shea Harlig
June 18, 2009 (House) Solomon Schiff
January 29, 2009 (Senate) Daniel J. Fellman
July 30, 2008 (House) Peter E. Hyman
July 17, 2008 (House) Stuart L. Berman
June 3, 2008 (House) Felipe Goodman
May 22, 2008 (Senate) Stephen Baars

The first rabbi to be invited to give a prayer opening a Congressional session was Morris Raphall (1798-1868), the rabbi of New York's Congregation B'nai Jeshurun. He delivered a prayer at the February 1, 1860, session of the House of Representatives, while in full rabbinic dress, "piously bedecked in a white tallit and a large velvet skullcap." Jonathan D. Sarna, "Rabbi Raphall Goes to Washington," The Forward, February 28, 2010. The text of his unquestionably "sectarian" prayer – which invoked several uniquely Jewish themes and repeated the Biblical priestly blessing in Hebrew -- appeared in the *Congressional Globe* and is reprinted as Appendix B to this brief. Cong. Globe, 36th Cong. 1st Sess. 648-649 (1860).

If "neutrality" were the governing standard for determining the constitutionality of legislative prayer, Rabbi Raphall's text and appearance would probably not have passed muster. Nonetheless, his pioneering presentation was hailed as "evincing the

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April 23, 2008 (House) Akiva Males
February 7, 2008 (Senate) Cheryl Jacobs
November 7, 2007 (House) Irwin N. Goldenberg
September 18, 2007 (House) Frederick L. Klein
July 12, 2007 (House) Ellen S. Wolintz-Fields
March 28, 2007 (House) Paul Silton,
March 22, 2007 (Senate) Milton Balkany
March 15, 2007 (House) Shea Harlig

We note that no rabbi delivered a prayer in the Senate between June 25, 2009, and September 15, 2011 – a span of more than two years. The court below found that a substantially shorter period of exclusively Christian prayers constituted an impermissible "endorsement" of Christianity.

triumph of an enlightened religious opinion over the vulgar prejudices of the world." Frank Leslie's Illustrated News, March 3, 1860. p. 219.

Similarly, the Jewish prayers of many rabbis at public events over the years have been "sectarian." Several examples appear in the margin.[3]

Just as courts should not be in the business of censoring prayers by Jewish clergy to remove uniquely Jewish references they should not be authorized to review Christian prayers to decide whether they contain too much Christology.

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[3] On February 7, 2008, Cheryl Jacobs included in her prayer an English translation of the priestly blessing.

On July 12, 2007, Ellen S. Wolintz-Fields referred to the Jewish observance of reading a portion of the Torah every week, noting that the Book of Numbers was being concluded.

On September 18, 2007, Frederick L. Klein referred to the then-recent observance of the Jewish New Year (Rosh Hashanah).

On March 15, 2007, Shea Harlig noted that the Jewish holiday of Passover was beginning that evening.

On March 22, 2007, Milton Balkany referred in his prayer to the fact that "only when Moses parted the waters was a nation [the Israelites] set free."

IV.

"DISCOMFORT" OR "OFFENSIVENESS" IS NOT A PERMISSIBLE CONSTITUTIONAL STANDARD FOR LIMITING RELIGIOUS EXPRESSION

Plaintiffs who object to "sectarian" Christian public prayers often allege that they are made "uncomfortable" or are "offended" by hearing distinctly Christological references during the prayer. See, *e.g.*, *Salazar v. Buono*, 559 U.S. 700 (2010) ("Buono claims to be offended by the presence of a religious symbol on federal land."); *Coles v. Cleveland Board of Education*, 171 F.3d 369, 374 (6th Cir. 1999) ("humiliated, demeaned and physically coerced"). Personal discomfort or "offense" at what is said is not, however, a permissible ground for suppressing speech.

This Court's plurality opinion in *Carey v. Population Services International*, 431 U.S. 678, 701 (1977), declared, "[W]e have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." See also *Hill v. Colorado*, 530 U.S. 703, 715 (2000) ("The fact that the messages conveyed by those communications may be offensive to their recipients does not deprive them of constitutional protection.") The Court suggested in *Cohen v. California*, 403 U.S. 15, 21 (1971), how persons who might be "offended" could avoid affront when the offensive speech is uttered in a public forum: "Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes."

The same rationale applies in the context of sectarian religious speech. The mere fact that many – or even most – onlookers would be offended by particular religious expression on public property does not justify its suppression. See *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995). The plaintiff's "offense" at seeing a large religious symbol on federal land was not, in and of itself, grounds for granting judicial relief in *Salazar v. Buono*, 559 U.S. 700 (2010). By the same token, the "offense" or "discomfort" allegedly suffered by persons attending the governmental meeting where a prayer – even one with overt Christian references – is recited cannot secure judicial relief because of his "discomfort" or "offense."

Indeed, when the first Jewish prayer was recited in the House of Representatives by Rabbi Raphall, it offended some in America's Christian community. A comment in The New York Herald in 1860, warned that "the next thing we shall have will be a Shaking Quaker dancing a reel." Another published comment wondered whether Rabbi Raphall's appearance meant that Brigham Young might be next, "surrounded by his harem, threatening to send the administration to hell." See Jonathan D. Sarna, "Rabbi Raphall Goes to Washington," *supra.*

V.

"ENDORSEMENT" IS NOT THE CORRECT CONSTITUTIONAL STANDARD FOR LEGISLATIVE PRAYER

The court of appeals invalidated the Town of Greece's legislative prayer program because it determined from a review of the Town's recent administration of its prayer program that it was an "endorsement" of Christianity if "viewed in its totality by an ordinary, reasonable observer." 681 F.3d at 29. The court below relied on this Court's decision in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), in determining that the Constitution forbids the appearance of governmental "endorsement" of a "particular sect or creed." 681 F.3d at 27.

The "endorsement" standard was articulated by Justice O'Connor in her opinion in *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984), and discussed approvingly by Justice Blackmun responding to Justice Kennedy's dissenting opinion in the majority opinion in the *Allegheny County* case. 492 U.S. at 603-605. Although the *amicus* was the attorney whose position with respect to a Jewish religious symbol prevailed in the *Allegheny County* case, that decision, insofar as it affected a Christian religious symbol, does not, in counsel's opinion, control this case or the legitimacy of sectarian legislative prayer.

Religious sectarian displays on public property do not, in and of themselves, violate the Establishment

Clause. Chanukah menorah displays that stand by themselves with no nearby Christmas tree (unlike the menorah in the *Allegheny County* case), have been held to be constitutionally permissible. *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993); *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992) (en banc). No "reasonable observer" believes that government is establishing a state religion by permitting a religious display on public property. By the same token, permitting clergymen to recite sectarian prayers at the inception of public meetings does not establish, as a state religion, the faith of the clergy. So long as the prayer does not proselytize and attendance is voluntary, the program is constitutional.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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August 2, 2013

APPENDIX A

Excerpt from the Lubavitcher Rabbi's Shlita Letter on the Question of the Regents Prayer

---

By the Grace of G-d
24th of MarCheshvan, 5723 [November 21, 1962]
Brooklyn, N.Y.

Greeting and Blessing:

The following is in reply to your request to state my views on the question of the Regents Prayer which became the subject of a controversy when the U.S. Supreme Court declared it, not unanimously but by a majority opinion, to be unconstitutional. I reiterate my views in writing, although I stated my position at greater length at a public gathering some months ago.

I want to make it clear that my views are based on the following aspects of the problem:

a. The question relates specifically to the non-denominational Regents Prayer, which reads:

> Almighty G-d, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country.

b. The procedure of the recitation of this prayer being that the students read it together with the teacher.

I am approaching this question from the viewpoint of our Torah (though I firmly believe that this position coincides with the best interests of the United States in general).

It is important to bear in mind that the question concerns a vast number of children in the Public Schools who do not receive any other religious training or instruction in the morning, the majority of them not even in the afternoon, and many of them not even in Sunday school. This assertion will be borne out if we compare the statistics about the number of children attending afternoon classes of religious instruction plus those attending Sunday school, (both forms of instruction being very minimal), with the number of children in the Public Schools; the enormous proportion of children receiving no religious instruction whatsoever will at once be revealed.

The following factors have to be considered from the viewpoint of the Torah and Shulchan Aruch (Code of Jewish Law):

1. Prayer as a Divine Commandment. According to all our authorities, it is a positive commandment to pray to G-d daily. The text of the prayers has, of course, been formulated and ordained, but the law also provides that under certain circumstances (e.g. where personal safety is a factor, and distractions of a similar nature) – a short prayer should be recited and the commandment is fulfilled thereby. (I have discussed the matter from the Halachic [Jewish law] viewpoint in my letter to Rabbi J., which is available

in Hebrew). Accordingly, the Regents Prayer is a valid prayer, especially as it contains two basic elements of prayer: acknowledgment (praise of G-d) and request.

2. Submission to the Kingdom of Heaven
(Kabbolas Ol Malchus Shomayim)

Recognition of the Divine Authority and obedience to it, is also one of the imperatives of the Torah, which is to be fulfilled every day. This is the basic purpose of our daily reading of the *Shema*. While the actual reading of the verses and portions of the *Shema* is required for the fulfillment of the precept, the element of "Submission to the Divine Authority" contained therein can also be expressed in any appropriate form (as this point has been more fully treated in the said Hebrew letter).
Thus, those Jewish children who do not recite the *Shema* daily could, at least, fulfill that part of it which expresses recognition of the Divine Authority – by means of the Regents Prayer.

3. There are certain precepts which are incumbent upon Jews not only every day, but every moment of their life, such as the belief in G-d, the love of G-d, reverence of G-d, etc., (as enumerated and explained in *Sefer haChinuch*, in the *Introduction*).

Precisely in the case of a very great number of children of the Public Schools and their parents, Jewish and gentile, it is likely, sad to say, that many days, weeks and months might pass by without their giving a thought to G-d in a more personal way, not to mention any thought of love and reverence for

G-d. (The widespread disinterestedness in religion and religious education among parents of Public School children seems to be borne out by the fact that so many children of the Public Schools receive no religious instruction whatever, as mentioned above. Some parents attempt to defend their neglect of religious instruction on financial grounds, but this excuse is not supported by their way of life, in which matters of *much* lesser importance are given priority).

Therefore the Regents Prayer, expressing as it does the acknowledgment of, and dependence upon, G-d, and that the welfare of this country and of the parents, children and teachers depends on G-d's benevolence, offers in many cases the only opportunity for the children to make some personal "contact" with G-d every day.

4. The hope expressed in some quarters that the banning of the Regents Prayer will somehow be compensated eventually by the introduction of more religion into the home, is very doubtful, in the light of the prevailing parental attitude, in those circles as mentioned above, towards religion. Be this as it may, it is certain that the *immediate* result of outlawing the Regents Prayer is that hundreds of thousands of children have been precluded from mentioning G-d's Name – in many cases the one and only opportunity they had of ever mentioning G-d's Name every school day of the week.

5. As for the argument that the Regents Prayer has little religious value because it would tend to become mechanical and would not reach the heart of

the child reciting it, the same argument can be used, and with greater justification, in the case of adults and in regard to any daily prayer in any place. It is, unfortunately, true that attendance at houses of worship sometimes in some such places degenerates into a social function rather than serving as a deep religious experience, but it is not necessarily the fault of the environment; and the same is true of the Public Schools.

As a matter of fact, children are usually more sincere and more receptive than adults, and a great deal depends on the teacher, and the Regents Prayer need not degenerate into a mechanical recitation if the teacher will put some feeling into it.

6. Consecration and Desecration of the Divine Name (Kiddush Hashem and Chilul Hashem)

Whatever justification there may be for it, but the fact is that broad sections of the American people, and of people all over the world, see the attempt to suppress the brief non-denominational Regents Prayers as an attempt to eradicate religion, even G-d's Name, from Public School education and this also from the personal lives of the vast majority of American children, inasmuch as their character, personality, world outlook, etc. are largely formed in the public schools.

With the exception of a small number of secularists and atheists, there is no parent who could in all conscience object to a non-denominational prayer *per se.* Inevitably, there has been formed in the public mind the impression that it is the atheists and secularists that are the ones

who strenuously object to the Regents Prayer, or any mention of G-d's Name, and those circles which identify themselves with the opposition to the Regents Prayer are quite naturally placed in the same camp with the secularists. There is thus an obvious case of *Chilul HaShem*, the Profanation of G-d's Name, and also to the good name of the Jewish people (that is, *Chilul HaShem* in the eyes of the gentiles).

7. There is an additional point to be considered: The responsibility which the Jewish religion imposes upon its adherents towards the non-Jew in the matter of dissemination of the belief in G-d; certainly not to weaken that belief in any way, directly or indirectly, which comes under the Biblical injunction: "Place not a stumbling block before the blind."

8. From every aspect of Jewish Law, it would appear clear that every Jew, for whom the Torah is a guide, is duty bound to use every legal and constitutional means to see the majority-decision of the Supreme Court on the Regents Prayer reversed.

9. It is surprising to see that there are some people who are under the impression that inasmuch as the Supreme Court is the highest court in the land, its decision is final and there is nothing that should be done about it.

Needless to say, this is not so, for the Constitution provides the ways and means of enacting or repealing laws, and of amending the Constitution itself. Constitutional ways and means

can be found, should public opinion demand it, to rectify a situation. Indeed, this is one of the basic foundations of the democratic system of which this country is so justly proud. It is of particular interest to the Jewish community since it is the basis on which it can justly and legally claim the repeal of the so-called Sunday Blue Laws, which are unfair and discriminatory for Jewish Sabbath observers.

10. The apprehension has been expressed in some quarters that the recitation of the Regents Prayer in the Public Schools in the manner in which it was carried out (bareheaded, and limited to only twenty-two words, *etc., etc.)* might create an erroneous impression among those students who are completely devoid of Jewish knowledge, even of the fundamentals of our faith. Such children might conclude that this prayer and the manner of its expression satisfies all the requirements of our Torah and the Jewish prayer; that it is permissible for Jews to pray bare-headed; that no synagogue attendance is necessary, etc., etc.

In my opinion, however, these apprehensions do not justify at all the elimination of all the positive aspects of the Regents Prayer as enumerated above. To be more exact: The said apprehensions do not at all justify the prevention of scores of thousands of Jewish children from fulfilling the Mitzvoth enumerated above, all the more so since they are basic Mitzvoth.

Needless to add, it is necessary to seek appropriate ways and means to eliminate, or at least reduce, the danger of those apprehensions being

materialized. One such solution should be, first and foremost, the enrollment of all Jewish students of the Public Schools into Talmud Torahs [Jewish day schools], in the post school hours at least. But regardless of all this, it is a vital necessity that they should pray every day (and in the morning) even if only the Regents Prayer.

So much for the strictly Halachic aspects of the problem under discussion.

I venture, however, to address myself also to the sentiments and imagination of everyone whose heart is alert to what is happening around him, and is especially sensitive to the problems of the growing generation, to view the problem as an image projected against the background of our critical time. In our present day and age of rising tension and insecurity under the threat of a nuclear war; of the steadily growing might of communism making ever greater encroachments upon the free world, steadily extending its influence not only over newly captured territories, but also over the minds of people living in the free democracies; of mounting juvenile delinquency —

America has been blessed with hundreds of thousands of children, boys and girls, Jewish and gentile, throughout the width and breadth of these United States, who daily raise their youthful voices in prayer to G-d, acknowledging that He is the Master of the Universe, invoking His blessings upon their country and all who are dear to them, and expressing their confidence in His benevolence.

With this image in mind, can anyone raise his hand to silence this vast body of American youth, saying: "Stop praising G-d! Stop praying to Him! It is forbidden to do so in the American Public School!" What would be the effect of such an order on all these youths? Can anything explain away to their young minds, far removed from Constitutional Law, the impact of such a prohibition in this country, where the free exercise of religion is one of its most cherished values?

I sincerely hope that every Jew who is conscious of the great heritage of our people, the people who brought the idea of One G-d to the world, will uphold the only position compatible with this tradition – to disseminate G-dliness and the observance of the Divine commandments everywhere and at all times, especially among the youth of today, the builders of our future.

With blessing,

/Signature/

APPENDIX B

Cong. Globe, 36th Cong. 1st Sess. 648-49 (1960)

Prayer of Rabbi M. Raphall, February 1, 1860

Almighty and most merciful God, we approach Thy presence this day to thank Thee for Thy past mercies, and humbly to beseech Thee to continue and extend the same to Thy servants, the representatives of these United States in Congress assembled.

Lord, great and manifold have been Thy bounties to this highly-favored land. Heartfelt and sincere are our thanks. While the vast despotisms of Asia are crumbling into dust, and the effete monarchies of the Old World can only sustain themselves by yielding to the pressure of the spirit of the age, it has been Thy gracious will that in this Western hemisphere there should be established a Commonwealth after a model of that which Thou, Thyself, didst bestow on the tribes of Israel, in their best and purest days. The Constitution and the institutions of this Republic prove to the world that men, created in Thy image and obedient to Thy behests, are not only capable, fully capable, of self government, but that they know best how to combine civil liberty with ready obedience for the laws, religious liberty with warm zeal for religion, absolute general equality with sincere respect for individual rights. In acquiring and carrying out these most wise institutions, Thy protection, Lord, has been signally manifest. It was Thy right hand that defended the founders of this Commonwealth, during the long and

perilous struggle of right against might. It was thy wisdom that inspired them when they established this Congress, to be what Thy tabernacle, with the *urim* and *thummim*-right and equity-were intended to have been for the tribes of Israel-the heart of the entire nation, where the wants, the feelings, and wishes of all might become known, to be respected by all, so that union might create strength, and concord keep pace with prosperity.

Lord, the ordinary life-time of a man has barely elapsed since this Constitution came into force, and under its auspices our country, from being feeble and poor has become wealthy and powerful, ready to take rank with the mightiest, and Thou, O Lord, wilt realize unto it Thy gracious promise unto Thy chose people: *Vehosireha adonai letobeh*-the Lord will distinguish thee for that which is good.

Supreme Ruler of the universe, many days and many weeks have gone by since Thy servants, our Representatives, first met in this Congress, but not yet have they been able to organize their House. Thou who makest peace in Thy High Heavens, direct their minds this day that with one consent they may agree to choose the man who, without fear and without favor, is to preside over this assembly. To this intent, Father most gracious, do Thou endow them with Thy spirit; the spirit of wisdom and of understanding: the spirit of counsel and of amity: the spirit of knowledge and of fear of the Lord. Grant, Father, that amidst the din of conflicting interests and opinions, Thy grace might direct them so that each one of them and all of them may hold the even tenor of their way-the way of moderation

and of equity: that they may speak and act and legislate for Thy glory and the happiness of our country; so that, from the North and from the South, from the East and from the West, one feeling of satisfaction may attend their labors; while the whole people of the land joyfully repeat the words of Thy Psalmist: "How good and how pleasant it is when brethren dwell together in unity."

Lord God of Abraham, of Isaac, and of Jacob, I, Thy servant, beseech Thee bless these Representatives, even as Thou hast directed Thy priests to bless Thy people.

Yebarekeka adonai Veyishmireka
Yo'air adonai panav aleka vy'chaneneka
Yissa adonai penav aleka veyasem Leka Shalom

May the Lord bless ye and preserve ye.

May the Lord cause his countenance to shine upon ye and be gracious unto ye.

May the Lord raise his countenance unto ye and grant ye peace.

May this blessing of the one who liveth and who reigneth forever rest upon your counsels and yourselves this day, and evermore. Amen.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 1 - 2013
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No. 12-696

IN THE SUPREME COURT OF THE UNITED STATES

TOWN OF GREECE,

Petitioner.

v.

SUSAN GALLOWAY and LINDA STEPHENS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a civil liberties organization that provides education and legal defense on issues relating to religious expression in the public square, as well as the family and sanctity of life, across the United States.

Liberty Counsel is committed to upholding the historical understanding and protection of the right to freely exercise religion in the public square and to ensuring that to such expression, such as legislative prayer at public meetings, remains a part of the country's cultural identify. Liberty Counsel has developed a substantial body of information related to the history, ubiquity and importance of legislative prayer to maintaining the fabric of freedom in the nation. Liberty Counsel respectfully submits this information to assist

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[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this Brief. The parties have filed consents to the filing of Amicus Briefs on behalf of either party or no party.

this Court in evaluating Petitioner's longstanding legislative prayer policy.

SUMMARY OF ARGUMENT

This Court has never ruled that status as an "offended observer" can suffice for Art. III standing, yet lower courts, including the courts in this case, continue to push the outer edge of the envelope to permit those are allegedly offended to topple longstanding governmental acknowledgements of religion. Despite the absence of direct precedent from this Court, appellate courts interpret this Court's continuing use of the endorsement test as license to broadly define standing in Establishment Clause cases. Continued adherence to the *Lemon*[2] test with its "endorsement" prong and "reasonable observer" standard has created a tyranny of the minority that aims to erase all vestiges of religion from the public square. The *Lemon* test and its endorsement prong have transformed the Establishment Clause from a shield against government intrusion into a sword aimed at destroying public acknowledgement of religion.

This case presents this Court with the opportunity to alleviate the difficulties posed by the uncertainty of standing in Establishment Clause cases. The uncertainty is itself a by-

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[2] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

product of continued reliance upon the *Lemon* test and in particular the endorsement prong that relies upon an elusive "reasonable observer" to determine whether a public religious acknowledgment violates the Establishment Clause.

ARGUMENT

I. OFFENDED OBSERVERS SUCH AS RESPONDENTS SHOULD NOT BE PERMITTED TO CHALLENGE PUBLIC ACKNOWLEDGMENTS OF RELIGION BASED UPON MERE PSYCHOLOGICAL DISCOMFORT WITH THE MESSAGE.

The district court's finding that Respondents have standing illustrates how far Establishment Clause standing jurisprudence has drifted from its Article III moorings. "Generally, in the context of an Establishment Clause challenge to legislative prayer, a plaintiff may establish standing by showing that he attended a meeting where he was exposed to prayer which he found offensive." *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 214 (W.D.N.Y. 2010).

> In this case, Plaintiffs felt uncomfortable and offended by the allegedly sectarian prayers, and

> they contend that when they complained, Town officials told them that they could leave the meetings if they did not like the prayers. Pursuant to *Cooper [v. U.S. Postal Service*, 577 F.3d 479, 489 (2d Cir. 2009)], the Court finds that these facts suffice to establish standing.

Id. at 215. In *Cooper*, the Second Circuit found that the plaintiff had standing merely because he was uncomfortable when he had to come into contact with a religious display in a post office near his home. 577 F.3d at 489. The *Cooper* court said that standing "is often a tough question in the Establishment Clause context, where the injuries alleged are to the feelings alone." *Id.* That sentiment in *Cooper*, which was adopted by the lower court in this case, rests upon the faulty premise that Establishment Clause violations must be analyzed differently because they will not cause injury sufficient to confer standing under the "traditional" view of Article III.

This Court rejected that presumption when the Third Circuit relied upon it to find standing in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 489 (1982). Carving out a special exception for Establishment Clause cases, as proposed by the Third Circuit in

Valley Forge, would render the "case or controversy" requirement of Article III at best a convenient vehicle for correcting constitutional errors and at worst a nuisance that may be dispensed with when it becomes an obstacle. *Id.* "This philosophy has no place in our constitutional scheme. It does not become more palatable when the underlying merits concern the Establishment Clause." *Id.* In Establishment Clause cases, as in other cases, Article III standing requires at an "irreducible minimum," a showing that a plaintiff has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," that the injury "fairly can be traced to the challenged action" and that the injury "is likely to be redressed by a favorable decision." *Id.* at 472.

Since *Valley Forge*, this Court has rejected attempts to transform Article III standing into "judicial versions of college debating forums." 454 U.S. at 473. This Court has rejected requests to exercise jurisdiction when doing so "would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Id.* (citing *United States v. SCRAP*, 412 U.S. 669, 687 (1973)). Just last term, this Court again confirmed that "Article III standing 'is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value

interests.'" *Hollingsworth v. Perry*, __ S.Ct. __, 2013 WL 3196927 at *6 (2013) (citing *Diamond v. Charles*, 476 U.S. 54, 62 (1986)).

Nevertheless, that is precisely what the lower courts here, and appellate courts throughout the country, have done, *i.e.*, placed standing in the hands of "bystanders," or "offended observers" whose only "injury" is discomfort at having to hear or see a public acknowledgement of religion. *See Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 214 (W.D.N.Y. 2010) ("Plaintiffs felt uncomfortable and offended by the allegedly sectarian prayers"). As was true in this case, the Fourth Circuit found that a city resident had standing to challenge legislative prayer based on her discomfort with having to hear sectarian prayers at the beginning of city council meetings. *Wynne v. Town of Great Falls,* 376 F.3d 292, 295 (4th Cir. 2004). The Sixth and Ninth Circuits found standing when teachers and students who attended school board meetings expressed discomfort at having to hear opening prayers. *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 374 (6th Cir. 1999); *Bacus v. Palo Verde Unified School Dist. Bd. of Educ.*, 52 Fed.Appx. 355, 356 (9th Cir. 2002). The Fifth Circuit found that an atheist city resident who was upset at having to see a Latin cross on the city's seal had standing to bring an Establishment Clause challenge. *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir.

1991). As the Second Circuit did in *Cooper*, the Fifth Circuit justified its expansion of standing by claiming that it "is particularly elusive in Establishment Clause cases." *Id.* (citing *Saladin v. City of Milledgeville*, 812 F. 2d 687, 692 (11th Cir. 1987)). In *Saladin*, the Eleventh Circuit cited the imprecision in Establishment Clause standing to justify a finding that plaintiffs had standing because they were troubled by having to view the city seal with a barely legible motto "Liberty and Christianity" on stationery and documents. 812 F.2d at 692.

In fact, it is not this Court's standing precedent, but the appellate courts' interpretation of precedent, that is problematic. When it has directly addressed standing, this Court has consistently required that the actual or threatened injury must be "concrete and particularized" as the result of an actual or imminent invasion of a legally protected interest. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This Court specifically found no concrete and particularized injury in a challenge to a state law that was based upon the party's religious differences with the nature of the material being presented. *Doremus v. Bd. of Educ.*, 342 U.S. 429, 435 (1952). Most notably, in *Valley Forge*, this Court clarified that psychic discomfort with a public acknowledgement of religion is not a concrete and particularized injury sufficient to support standing. *Valley Forge*, 454 U.S., at 485–486.

> They [Plaintiffs] fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy. "[T]hat concrete adverseness which sharpens the presentation of issues," *Baker v. Carr*, 369 U.S. [186], at 204 [(1962)], is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself.

Id.

This Court has continued to emphasize that "the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree." *Elk Grove USD v. Newdow*, 542 U.S. 1, 44 (2004) (O'Connor, J., concurring). "It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory." *Id.*

> There is no doubt that respondent is sincere in his atheism and rejection of a belief in God. But the mere fact that he disagrees with this part of the Pledge does not give him a veto power over the decision of the public schools that willing participants should pledge allegiance to the flag in the manner prescribed by Congress.

Id. at 32. (Rehnquist, C.J., concurring). "Michael Newdow's challenge to petitioner school district's policy is a well-intentioned one, but his distaste for the reference to 'one Nation under God,' however sincere, cannot be the yardstick of our Establishment Clause inquiry." *Id.* at 44 (O'Connor, J., concurring). "Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty. It would be ironic

indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it." *Id.* at 44-45.

That is precisely what has happened as appellate courts have continued to permit Establishment Clause cases to proceed on little more than an allegation of psychological discomfort. *See e.g., Galloway*, 732 F. Supp. 2d at 214 (Plaintiffs felt uncomfortable and offended by the allegedly sectarian prayers). Eschewing this Court's statements that mere psychological injury is inadequate to support standing, appellate courts have adopted the offended observer concept of standing, by misinterpreting this Court's discussion distinguishing the facts of *Valley Forge* from the facts in *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963). This Court distinguished the circumstances in *Valley Forge*, which did not support standing, with the circumstances in *Schempp*, which did support standing, by pointing out that the plaintiffs in *Schempp* suffered cognizable injury because "impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 487 n.22. This Court based its analysis upon the fact that the students in *Schempp* were compelled to be at school and therefore were a captive audience unable to avoid the religious content. *Id.*

Notably, this Court specifically warned against reading its decision in *Schempp* as sanctioning standing based upon having merely a "spiritual stake," or psychic injury. *Id.*

However, that is precisely what lower courts have done. According to the Fourth Circuit, "in *Valley Forge* itself, the Court interpreted *Schempp* to premise standing on the fact that plaintiffs 'were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them,' not that they in fact did assume these burdens." *Suhre v. Haywood County*, 131 F.3d 1083, 1088 (4th Cir. 1997) (citations omitted). "The cognizable injury caused by personal contact with a public religious display may thus satisfy the injury-in-fact requirement for standing to bring an Establishment Clause case." *Id.* at 1090. The Fourth Circuit failed to recognize the context of this Court's discussion of *Schempp*, *i.e.*, that the plaintiffs in *Schempp* were compelled to be in school, and instead found that *Valley Forge* supports the proposition that standing in Establishment Clause cases can be based upon unwelcome contact with religious exercises or displays. *Id.*

Similarly, the Eleventh Circuit interprets *Valley Forge* as supporting standing for state residents who saw a cross memorial in a state park from an airplane or merely heard about the cross from anonymous phone calls and news releases and decided against visiting the

park. *ACLU of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1107 (11th Cir. 1983). Even merely having to view a cross or religious reference on a governmental seal constitutes injury in fact sufficient to constitute standing under *Valley Forge,* according to Eleventh Circuit in *Saladin*, 812 F. 2d at 692 and the Tenth Circuit in *Foremaster v. City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989).

> Foremaster's allegations of direct, personal contact suffices as non-economic injury. He claimed that "the visual impact of seeing that Temple on a daily basis as part of an official emblem ... has and continues to greatly offend, intimidate and affect me." Although he did not contend he changed his behavior, he did allege that the presence of the religious logo in the City Hall offended and intimidated him. *His direct personal contact with offensive municipal conduct satisfied Valley Forge.*

882 F.2d at 1491 (emphasis added). Similarly, the Ninth Circuit has relied upon *Valley Forge* to support standing for a citizen who was offended by having to view, in the distance, a veterans' memorial containing a cross while

traveling along a highway in the California desert. *Buono v. Norton*, 371 F.3d 543, 547 (9th Cir. 2004). Because the citizen was offended and therefore did not visit the area as often as he wanted, he suffered an injury that goes beyond mere psychological discomfort, and therefore satisfies *Valley Forge*, according to the Ninth Circuit. *Id.*

The Sixth Circuit has also relied upon *Valley Forge* to support standing for mere unwelcome observation of religious exercise or display. In *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679, 681 (6th Cir.1994), the court held that a graduate had standing to challenge his high school alma mater's display of a portrait of Jesus Christ because he continued to visit the school and encounter the portrait. Even the possibility of coming into contact with a planned public display can support standing for an Establishment Clause challenge, according to the Sixth Circuit in *Adland v. Russ*, 307 F.3d 471, 478 (6th Cir. 2002).

Most recently, the Eighth Circuit found that a group of Freethinkers who felt "isolated and unwelcome" by the continued presence of a Ten Commandments monument on city-owned land had expressed an "injury in fact" sufficient to confer standing. *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1024 (8th Cir. 2012). The court acknowledged that the plaintiffs' injuries "are largely emotional," but

insisted that was not constitutionally significant. *Id.* "To the extent that emotional harms differ from other, more readily quantifiable harms, that difference lacks expression in Article III's case-or-controversy requirement." *Id.*

Acknowledging that their expansive definitions of standing do not follow directly from this Court's opinion in *Valley Forge* or other precedents, circuit courts have relied upon this Court's silence in cases with similar standing circumstances to justify their conclusions. For example, in *Red River Freethinkers*, the Eighth Circuit noted that none of the Justices on this Court questioned the plaintiff's standing based upon unwelcome contact with a Ten Commandments monument in *Van Orden v. Perry*, 545 U.S. 677 (2005). *Id.* at 1024 n.8. In *Murray*, the Fifth Circuit relied heavily on the fact that "standing has not been an issue in the Supreme Court in similar cases." *Murray v. City of Austin*, 947 F.2d at 151. This Court has warned lower courts against mistaking silence for acquiescence. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448 (2011). "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Id.* Notably, the Eighth Circuit acknowledged this language from *Winn*, but said, "we nevertheless observe that no Justice

questioned Van Orden's standing." *Red River Freethinkers*, 679 F.3d at 1024 n.8.

In a slightly different twist, the Fourth Circuit based its finding of standing based upon unwelcome contact on this Court's failure to offer explicit directions in *Valley Forge* or other cases. *Suhre*, 131 F.3d at 1088. Similarly, the Second Circuit cited this Court's lack of explicit directions in *Valley Forge* to justify its conclusion that standing in Establishment Clause cases can be based upon "injuries to the feelings alone," *Cooper*, 577 F.3d at 489. The Second Circuit reasoned that this Court's failure to delineate what plaintiffs needed to assert to confer standing in *Valley Forge* granted lower courts license to define standing to accommodate particular scenarios. *Id.* at 490. "This passage explains what standing is not, without saying what standing is in these kinds of cases." *Id.* "Lower courts are left to find a threshold for injury and determine somewhat arbitrarily whether that threshold has been reached." *Id.* According to the Second and Fourth circuits, if this Court does not create an exhaustive description of the injuries upon which standing can be based, then lower courts are free to make their own, admittedly "arbitrary" determinations regarding whether and to what extent the regular rules of standing should apply in Establishment Clause challenges. *See id.*; *Suhre*, 131 F.3d at 1088.

Courts have embraced that perceived authority and elevated "offended observers" to the status of plaintiffs able to topple longstanding public acknowledgements of religion such as Petitioner's opening prayer. This strips any real meaning from Article III standing in Establishment Clause cases. Standing has been transformed from a vehicle to ensure that only justiciable controversies are reviewed by the courts to a tool used by hecklers to veto public religious observances with which they disagree. This Court should act to restore the constitutional meaning of Article III standing by clarifying that the status of an "offended observer" does not satisfy Article III requirements of a concrete and particularized injury in Establishment Clause challenges.

II. THIS COURT SHOULD ABANDON THE REASONABLE OBSERVER STANDARD AND ENDORSEMENT TEST UNDER *LEMON*.

The proliferation of "offended observer" standing and the resulting transformation of Establishment Clause standing into a heckler's veto is the direct result of this Court's continuing reliance upon the "reasonable observer" concept of endorsement contained within the maligned but sentient *Lemon* test.

Lemon v. Kurtzman, 403 U.S. 602 (1971). When the effects prong of the *Lemon* test was renamed "endorsement," the focus of the inquiry shifted from the actions of the government to the reactions of those observing government actions. *See Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor J., concurring) (clarifying *Lemon* by recasting effects as endorsement). When the concept of a "reasonable observer" was inserted into the endorsement test, courts' attention was further diverted away from whether government acted with the intent to establish religion to whether someone might perceive that the government is favoring religion. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring) (discussing the "reasonable observer"). While this Court has criticized the "reasonable observer" concept, the "endorsement" prong and the *Lemon* test, it has not abandoned them. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment) (the Lemon/endorsement test continues to "stal[k] our Establishment Clause jurisprudence" like "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."). Instead, the "reasonable observer" remains a benchmark for determining whether governmental actions violate the

Establishment Clause. *See Pinette*, 515 U.S. at 779.

Consequently, appellate courts can justify adopting ever-widening definitions of standing for Establishment Clause claims by pointing to allegations that "reasonable observers" are "injured" because they perceive that certain governmental actions favor religion. *See e.g., Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1024 (8th Cir. 2012) (finding standing for admittedly "emotional" injuries based upon having to view a monument). This case shows that the endorsement test and its reasonable observer standard that the Court intended to be a yardstick for measuring when government crosses the line from acknowledgement to endorsement, s*ee Pinette*, 515 U.S. at 779, has morphed into a weapon aimed at eliminating all vestiges of public religious expression.

In her development of the "reasonable observer" concept, Justice O'Connor envisioned the reasonable observer as similar to the "reasonable person" in tort law, who "is not to be identified with any ordinary individual, who might occasionally do unreasonable things," but is "rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment." *Id.* at 779-780.

> Thus, "we do not ask whether there is any person who could find an

endorsement of religion, whether some people may be offended by the display, or whether some reasonable person might think [the State] endorses religion." *Americans United*, 980 F.2d, at 1544. Saying that the endorsement inquiry should be conducted from the perspective of a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share neither chooses the perceptions of the majority over those of a "reasonable non-adherent," *cf.* L. Tribe, AMERICAN CONSTITUTIONAL LAW 1293 (2d ed. 1988), nor invites disregard for the values the Establishment Clause was intended to protect. It simply recognizes the fundamental difficulty inherent in focusing on actual people: There is always someone who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. *A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable.*

Id. at 780 (emphasis added). Therefore, the endorsement inquiry *should not* be "about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe." *Id.* (emphasis added). The test should not "focus on the actual perception of individual observers, who naturally have differing degrees of knowledge." *Id.* "Under such an approach, a religious display is necessarily precluded so long as some passersby would perceive a governmental endorsement thereof." *Id.*

In fact, that is precisely what has happened. Appellate courts have focused on the actual perceptions of individual observers with differing degrees of knowledge, and if those observers perceive that a government observance or display favors religion in a way that offends them, then the observance or display is precluded. *See e.g., Red River Freethinkers,* 679 F.3d at 1024; *Suhre*, 131 F.3d at 1088; *Adland*, 307 F.3d at 478. These results are not surprising in light of the "reasonable observer"/endorsement test's history of confusion and misinterpretation that has at times even caused dissension among members of this Court.

In *Pinette*, Justice O'Connor found that the reasonable observer looking at the Ku Klux Klan's display of a Latin cross in a plaza next

to the state capital "would view the Klan's cross display fully aware that Capitol Square is a public space in which a multiplicity of groups, both secular and religious, engage in expressive conduct." *Pinette*, 515 U.S. at 782 (O'Connor, J., concurring in part and concurring in the judgment).

> Moreover, this observer would certainly be able to read and understand an adequate disclaimer, which the Klan had informed the State it would include in the display at the time it applied for the permit, and the content of which the Board could have defined as it deemed necessary as a condition of granting the Klan's application.

Id. By contrast, Justice Stevens found:

> [A] reasonable observer would likely infer endorsement from the location of the cross erected by the Klan in this case. Even if the disclaimer at the foot of the cross (which stated that the cross was placed there by a private organization) were legible, that inference would remain, because a property owner's decision to allow a

> third party to place a sign on her property conveys the same message of endorsement as if she had erected it herself."

Id. at 806 (Stevens, J., dissenting). Justice Ginsburg similarly held that a reasonable observer viewing the stand-alone cross and aware of the fact that "no human speaker was present to disassociate the religious symbol from the State....No other private display was in sight. No plainly visible sign informed the public that the cross belonged to the Klan and that Ohio's government did not endorse the display's message" would conclude that the state endorsed the display. *Id.* at 817 (Ginsburg, J., dissenting).

As Justice Scalia observed, the justices' disagreement about whether the "hypothetical beholder who will be the determinant of 'endorsement' should be any beholder (no matter how unknowledgeable), or the average beholder, or (what Justice STEVENS accuses the concurrence of favoring) the 'ultra-reasonable' beholder" shows how the endorsement test has led to "invited chaos." *Pinette*, 515 U.S. at 768 n.3. "And, of course, even when one achieves agreement upon that question, it will be unrealistic to expect different judges (or should it be juries?) to reach consistent answers as to what any beholder, the average beholder, or the ultra-

reasonable beholder (as the case may be) would think. It is irresponsible to make the Nation's legislators walk this minefield." *Id.*

The endorsement test and its reasonable observer component have been unworkable and ineffective since their inception, as exemplified by the internally inconsistent results in some of this Court's prominent Establishment Clause cases.

A reasonable observer in Pawtucket Rhode Island would not view the city's Christmas display that included a creche, Santa Claus house, reindeer, candy-striped poles, a Christmas tree and carolers as endorsing religion, according to Justice O'Connor. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). "Although the religious and indeed sectarian significance of the crèche, as the district court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display." Justices Brennan, Marshall, Blackmun and Stevens disagreed: "For many, the City's decision to include the crèche as part of its extensive and costly efforts to celebrate Christmas can only mean that the prestige of the government has been conferred on the beliefs associated with the crèche, thereby providing 'a significant symbolic benefit to religion...." *Id.* at 701 (Brennan, J. dissenting).

Holiday displays in the Allegheny County courthouse resulted in equally fractured rulings under the endorsement test. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). One of the displays challenged in the case was a creche placed in the county courthouse and the other a display that included a menorah, Christmas tree, and sign saluting liberty in front of the city-county building. *Id.* at 587. Analyzing the tree and menorah display, the plurality found that a reasonable observer would not view the addition of the menorah to the tree display as an endorsement of the Christian and Jewish faiths. *Id.* at 620. Justice O'Connor said that the display "conveyed a message of pluralism and freedom of belief during the holiday season." *Id.* at 635 (O'Connor, J. concurring). "A reasonable observer would, in my view, appreciate that the combined display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens." *Id.* at 635-636. However, Justice Brennan stated that the reasonable observer could not overlook the "religious significance" of the Christmas tree when it is placed next to a menorah. *Id.* at 641 (Brennan, J., concurring in part and dissenting in part). "I shudder to think that the only 'reasonable observer' is one who shares the

particular views on perspective, spacing and accent expressed in Justice Blackmun's opinion, thus making analysis under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law." *Id.* at 642-643. Justice Stevens also found that the reasonable observer would find that the "presence of the Chanukah menorah, unquestionably a religious symbol, gives religious significance to the Christmas tree. The overall display thus manifests governmental approval of the Jewish and Christian religions." *Id.* at 654 (Stevens, J., concurring in part and dissenting in part).

Justice Kennedy's characterization of the endorsement/reasonable observer standard illustrates why it is ineffectual as a constitutional measuring stick. *Id.* at 675-676 (Kennedy, J. dissenting).

> This test could provide workable guidance to the lower courts, if ever, only after this Court has decided a long series of holiday display cases, using little more than intuition and a tape measure. Deciding cases on the basis of such an unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitutional adjudication. "It would be appalling

> to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying they were offended – but would have been less so were the crèche five feet closer to the jumbo candy cane." *American Jewish Congress v. Chicago*, 827 F.2d 120, 130 (CA7 1987) (Easterbrook, J., dissenting).

Id. Rather than providing an objective, neutral standard for courts to use when analyzing Establishment Clause challenges and legislatures to use when drafting legislation, the endorsement test and its "reasonable observer" standard have only further complicated what was already a labyrinthine constitutional analysis.

The inconsistent rulings among and within the circuits and even within decisions by this Court illustrate that the endorsement test is not the kind of objective standard necessary to analyze Establishment Clause claims. The endorsement test contains insoluble difficulties that render the test "incomprehensible."[3] "Is

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[3] William P. Marshall, *"We Know it When We See It." The Supreme Court Establishment*, 50 S. CAL. L.REV. 495, 536-537 (1986).

the objective observer (or average person) a religious person, an agnostic, a separationist, a person sharing the predominate religious sensibility of the community, or one holding a minority view? Is there any 'correct' perception?"[4] One problem with the test is that it "attempts to objectify that which avoids objectification."[5] The test "incorrectly assumes that the symbolic inquiry is reducible to a rational construct, while the interpretation of symbols, and perhaps religion itself, is inherently irrational. Objectifying the inquiry in this manner is, as the idiom suggests, to place a square peg in a round hole."[6]

The fractured results spawned by the endorsement test show why it should be abandoned as an intellectually incoherent legal standard. With few exceptions, "the outcome of any constitutional case judged under the endorsement/objective observer analysis can be changed by simply altering the characteristics of the observer."[7] That is apparent in the inconsistent circuit court decisions that have used the uncertainty inherent in the endorsement test to create admittedly arbitrary

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4 *Id.* at 537.

5 *Id.* at 536.

6 *Id.*

7 Jesse H. Choper, *The Endorsement Test: Its Status And Desirability,* 18 J. L. & POL'Y 499, 513-514 (2002).

definitions of standing for Establishment Clause challenges. When someone can challenge a decades old religious exercise by merely stating that they are "offended" by listening or viewing it, there can be no doubt that the standard is ineffective.

As one constitutional scholar stated:

> Under the endorsement approach, reasonable perceptions of state approval or endorsement which beget legitimate feelings of alienation or offense by a segment of the population–and nothing more –trigger a holding of unconstitutionality. While this may indeed be an attractive feature of the test insofar as it appeals to our compassionate instincts...absent any meaningful threat to religious liberty, distressed sensibilities should not rise to the level of a judicially cognizable harm under the Establishment Clause because, if the endorsement threshold were faithfully applied, it would unjustifiably operate to invalidate desirable governmental attempts to accommodate religious interests as

> well as improperly authorize official injury to religious liberty.[8]

"In our pluralistic culture, 'not all beliefs can achieve recognition and ratification in the nation's laws and public policies; and those whose positions are not so favored will sometimes feel like 'outsiders.'"[9] "It is clear that the Constitution cannot generally provide relief when this occurs."[10]

Nevertheless, as this case illustrates, that is precisely what the endorsement test and its "reasonable observer" standard have done. Anyone who might feel slighted by a government observance or display that, from his perspective, gives too much attention to or provides too much support, even tangentially, to a particular religious tradition has the power to veto the presentation. The "offended observer" standard, like the reasonable observer under *Lemon*, improperly focuses upon the reactions of audience members instead of the actions of the government, which is what should be the focus in Establishment Clause claims, particularly in legislative prayer cases. *Rubin v. City of Lancaster*, 710 F.3d 1087, 1094 (9th Cir. 2013) (citing *Marsh v. Chambers*, 463 U.S. 783 (1983)). The ad-hoc,

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8 Choper, *The Endorsement Test*, at 521.

9 *Id. at 523.*

10 *Id.*

fact-specific reasonable observer standard wreaks havoc not only with the courts of appeal which must determine whether a claim is justiciable, but also with legislative bodies. "Governments face a Hobson's choice: foregoing [legislative prayer] or facing litigation. The choice most cash-strapped governments would choose is obvious, and it amounts to a heckler's veto." *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1106 (10th Cir. 2010).

This hecklers' veto is antithetical to this Court's Establishment Clause jurisprudence. Consequently, the endorsement test and its "reasonable observer" standard that have led to "offended observer" standing utilized by appellate courts throughout the country and the lower court rulings here should be explicitly abandoned by this Court.

III. THE PROBLEM OF THE HECKLERS' VETO INHERENT IN THE ENDORSEMENT PRONG OF *LEMON* DEMONSTRATES WHY *LEMON* NEEDS TO BE OVERRULED AND REPLACED WITH AN OBJECTIVE TEST.

The extent to which standing has been stretched under the endorsement prong of *Lemon*—to the extent that merely being an offended observer can create standing—

illustrates why this Court should abandon *Lemon* and replace it with an objective test that would differentiate between permissible public acknowledgment and impermissible public endorsement of religion. This would comport with this Court's concern that the country continue to honor "the religious history that gave birth to our founding principles of liberty." *Elk Grove USD v. Newdow*, 542 U.S. 1, 44 (2004) (O'Connor, J., concurring). As Justice Scalia said, "I would prefer to reach the same result by adopting an Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied–the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments." *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring).

As this Court has acknowledged, the wide variety of governmental functions that might be challenged under the Establishment Clause means that there cannot be a "one size fits all" test. "Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches." *Bd. of Educ. of Kiryas*

Joel Village School Dist. v. Grumet, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part).

> It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause. There is, after all, only one Establishment Clause, one Free Speech Clause, one Fourth Amendment, one Equal Protection Clause. *See Craig v. Boren*, 429 U.S. 190, 211, 97 S.Ct. 451, 464, 50 L.Ed.2d 397 (1976) (Stevens, J., concurring). But the same constitutional principle may operate very differently in different contexts. We have, for instance, no one Free Speech Clause test. We have different tests for content based speech restrictions, for content neutral speech restrictions, for restrictions imposed by the government acting as employer, for restrictions in nonpublic fora, and so on. This simply reflects the necessary recognition that the interests relevant to the Free Speech Clause inquiry – personal liberty, an informed citizenry, government efficiency, public order,

> and so on – are present in different degrees in each context. And setting forth a unitary test for a broad set of cases may sometimes do more harm than good. Any test that must deal with widely disparate situations risks being so vague as to be useless. I suppose one can say that the general test for all free speech cases is "a regulation is valid if the interests asserted by the government are stronger than the interests of the speaker and the listeners," but this would hardly be a serviceable formulation. Similarly, *Lemon* has, with some justification, been criticized on this score.

Id. at 718-719. As is true with Free Speech cases, Establishment Clause challenges involve different contexts, including: (1) government action targeted at particular individuals or groups, (2) government (acknowledgment or) speech on religious topics, (3) government decisions involving religious doctrine and religious law, and (4) governmental delegations of power to religious bodies, under which the issues underlying the clause will operate quite differently. *See id.* at 720. In other words, there are different standards and concerns with funding cases, church property or employment

disputes, and government acknowledgments of religion such as the legislative prayer at issue here. Establishment Clause concerns are more heightened in the former two than in the latter. Government funding of religious activities or judicial inquiry into church practices to resolve property or personnel matters are more likely to raise Establishment Clause concerns than "under God" in the Pledge of Allegiance, "In God We Trust" on our currency, passive displays that include the Ten Commandments, war memorials that include crosses or invocations at the beginning of legislative sessions.

Any test adopted to replace *Lemon* must strive to separate a real threat from a harmless shadow, an establishment of religion from an acknowledgment. However, as Justice O'Connor cautioned, "the bad test may drive out the good. Rather than taking the opportunity to derive narrower, more precise tests from the case law, courts tend to continually try to patch up the broad test, making it more and more amorphous and distorted. This, I am afraid, has happened with *Lemon*." *Id.*

This case is the latest example of the truth of Justice O'Connor's conclusion. The various patches applied to *Lemon*, including the "endorsement" test, have only added to the confusion that has left this Court's Establishment Clause jurisprudence "in

hopeless disarray." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring). Instead of continuing to patch up *Lemon*, which has only gotten worse over time, Amicus proposes that this Court adopt a new objective test for Establishment Clause challenges of government observances and displays. Under this proposal, if a religious observance (1) comports with history and ubiquity, and (2) does not objectively coerce participation in a religious exercise or activity, then it would be deemed a permissible acknowledgment of religion, not a violation of the Establishment Clause.

A. History And Ubiquity, Properly Applied, Would Distinguish Public Acknowledgment From Establishment.

The first part of Amicus' proposed test focuses on "history and ubiquity." Ubiquity in this context is not the dictionary meaning of "omnipresent," but a practice "observed by enough persons" to warrant the term. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring). Ubiquity is less helpful than history. Every practice has had small beginnings, and some practices create new arrangements based on

old traditions. Each Presidential invocation of God is both new and old. State mottos, constitutional preambles, the Pledge of Allegiance, and creche displays began at a point in history. Christmas did not begin as a widely celebrated holiday, but it has become so. Pressing ubiquity too much would mean creches were once impermissible but are now permissible because more people celebrate Christmas. At an extreme, an established church could become permissible because most people have acted in a way over time to establish religion.

Ubiquity is helpful only to the extent that it illuminates historical tutelage, one of the two aspects of history, the other being historical meaning. Historical tutelage looks at historical practices to distinguish between mere shadows of religious acknowledgment versus real threats of establishment. References to God in the country's mottos, constitutions, historical documents and even legislative prayers, have neither established nor tended to establish religion and would, therefore, be regarded as mere shadows of religious acknowledgment, not establishments.

Whether an acknowledgement of religion has sparked controversy is not helpful in discerning between acknowledgment and establishment. Longstanding practice and the lack of controversy do not create "a vested or protected right" to violate the Constitution *Id.*

at 39. However, the presence of controversy can undercut a constitutional practice. *Id.* Litigation is, by definition, a controversy. Relying upon controversy could create a "heckler's veto," as happened in this case, which would doom not only legislative prayer, but such acceptable practices as Sunday closing laws and school funding, which this Court has upheld as constitutional.

What is relevant, then, is whether history reveals that a practice has established or tended to establish religion. An historical meaning analysis should look for the best understanding of the purposes of the Establishment Clause, for which there is some agreement. Some general assumptions regarding the meaning of the Establishment Clause include that government cannot establish a church, discriminate among sects, or objectively compel a certain sectarian belief. There are divergent opinions beyond these areas, but this Court has found historical meaning to be relevant in upholding legislative prayers, property tax exemptions, and creches, noting that "an unbroken practice ... is not something to be lightly cast aside."

This Court has declared that the Establishment Clause permits the following government funding of religious activities or education: vouchers, scholarships, bus transportation, books, teaching materials, projectors, onsite training by public school

teachers, interpreters, remedial supplemental education, buildings, revenue bonds, and construction grants.[11] This Court has also approved property tax exemptions, a government-funded hospital run by a Roman Catholic order, and suggested that Medicare funds used by sectarian healthcare providers pose no constitutional problem.[12] Although a

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[11] *See e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 667-68 (2002)(vouchers); *Mitchell*, 530 U.S. at 793 (educational materials); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)(interpreters); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (counseling); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986)(scholarship); *Mueller v. Allen*, 463 U.S. 388 (1983)(tax deduction for tuition); *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736 (1976)(grants to private colleges); *Hunt v. McNair*, 413 U.S. 734 (1973)(revenue bonds for college facilities); *Tilton v. Richardson*, 403 U.S. 672 (1971)(grants for college facilities); *Board of Educ. v. Allen*, 392 U.S. 236 (1968)(loan of textbooks).

[12] *See e.g., Zelman*, 536 U.S. at 667-68; *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982)(property grant); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)(property tax exemption); *Quick Bear v. Leupp*, 210 U.S. 50 (1908)(treaty and trust funds may be used for

guiding principle in government funding cases centers on neutrally available benefits and private choices, the fact remains the result of such, at least indirectly, is that the religious mission of the institution is advanced. In some cases, children who forgo government funding may lose out altogether on obtaining religious benefits. If the Establishment Clause reaches its apex in government funding of sectarian institutions and education and if government may at least fund such indirectly, the result of which is to advance the religious mission, then how much less does a passive display on law and government containing one religious/secular document not violate the Establishment Clause? If funding cases have not raised the shadow of an established religion, then the Foundations Display will not. Surely this Court is "unable to perceive the Archbishop of Canterbury, the Vicar of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage, long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of

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religious education); *Braunfield v. Roberts*, 175 U.S. 291 (1899)(religious hospital).

establishment of a state church is farfetched indeed."[13]

The same is true of public acknowledgments such as the legislative prayer at issue here, which this Court has described as "part of the fabric of our society." *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). "To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* Replacing *Lemon* with a test based upon history would properly differentiate between this tolerable acknowledgement and a true establishment.

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[13] *Lynch*, 465 U.S. at 686. *See also Aguilar v. Felton*, 473 U.S. 402, 419-20 1985)(Burger, C.J., dissenting)("It borders on paranoia to perceive the Archbishop of Canterbury or the Bishop of Rome lurking behind programs that are just as vital to the Nation's schoolchildren as textbooks"). The view of Justice Burger, who authored *Lynch*, was later accepted by the majority when *Aguilar* was overruled by *Agostini*, 521 U.S. 203 (1997). History confirms the Archbishop is still held at bay.

B. A Coercion Analysis Should Focus On Compulsion Rather Than Psychological Coercion.

The coercion factor in the proposed objective test would be more akin to legal compulsion than to psychological coercion. This would comport with the original intent of the Framers of the Constitution and this Court's pre-*Lemon* jurisprudence. *Van Orden*, 545 U.S. at 693-694 (Thomas, J. concurring).

The Framers understood that an establishment necessarily involved "actual legal coercion." *Id.* at 693. "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty." *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (SCALIA, J., dissenting). "Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. L. Levy, THE ESTABLISHMENT CLAUSE 4 (1986)." *Id.* "Thus, for example, in the Colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of

Anglican ministers, and were taxed for the costs of building and repairing churches. *Id.*, at 3-4." *Id.* at 641-642. "In other words, establishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers." *Van Orden*, 545 at 693 (Thomas, J. concurring). "[G]overnment practices that have nothing to do with creating or maintaining ... coercive state establishments simply do not "implicate the possible liberty interest of being free from coercive state establishments." *Id.* at 693-694.

Governmental acknowledgments of religion are pervasive. The mere presence of a religious symbol or statement that is pervasive historically and physically does not send a message of compulsion. Acknowledgments such as passive displays or invocations are far less likely to pose a real threat of coerced belief than are other forms of governmental involvement with religion such as the state churches that were a concern for the Founding Fathers. "Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty." *Newdow*, 542 U.S. at 39.

As this Court said in *Marsh*, "legislative prayer presents no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious

organizations." 463 U.S., at 791 (citations omitted). The "Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society." *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in part, dissenting in part). "Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage." *Id.* at 662-663.

Mere recitation of an opening prayer does not "coerce anyone to support or participate in any religion or its exercise" and does not "give direct benefits to a religion in such a degree that it in fact establishes a state religion or tends to do so." *Id.* at 659. "[I]t would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing." *Id.* at 659-660. "Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal." *Id.* at 662.

Consequently, including coercion in the form of legal compulsion as part of an alternative to *Lemon* would comport with this Court's historical Establishment Clause jurisprudence and with the Framer's intent. This more objective standard would relieve the confusion and chaos that *Lemon* has spawned and would provide local governments such as Petitioner with the kind of definitive guidance that is necessary to retain historically significant religious observances without fear of being sued by offended observers.

CONCLUSION

Permitting litigants to challenge longstanding governmental acknowledgements of religion based upon mere status as offended observers strips Article III of meaning in Establishment Clause challenges. The ever expanding concept of standing exemplified by the offended observer status is a direct result of this Court's continuing use of the endorsement test and its reasonable observer standard as part of the *Lemon* test. This case presents an opportunity to finally abandon the unworkable and ineffective *Lemon* test and replace it with an objective standard based upon history and coercion.

Amicus respectfully requests that this Court take the opportunity to euthanize *Lemon* and provide lower courts and governmental agencies with a workable objective standard.

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 12-696

In The
Supreme Court of the United States

TOWN OF GREECE,
Petitioner,
v.
SUSAN GALLOWAY AND LINDA STEPHENS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Establishment Clause protects citizens participating in local town board meetings—such as citizens seeking business or zoning permits or advocating for particular legislative policies—from being asked to participate in sectarian prayers.

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INTEREST OF AMICI CURIAE[1]

Amici are Members of Congress in the U.S. House of Representatives.[2] *Amici* are bound by an oath to support and defend the Constitution. The House opens its proceedings with legislative prayer and that historic practice was relied upon by the Court in *Marsh* v. *Chambers*, 463 U.S. 783 (1983). The Court found this historic practice poses "no real threat" under the Establishment Clause. *Id.* at 795. *Amici* are supportive of the traditional form of legislative prayer practiced in the House. This case, however, presents a different type of prayer practice that occurs in a different setting and context. *Amici* have an interest in how the Court considers those differences. *Amici* also have an interest in ensuring that this case is not, as advocated by certain *amici* supporting Petitioner, used to displace longstanding Establishment Clause jurisprudence that concerns practices other than legislative prayer.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, as indicated by letters of consent filed with the Clerk of this Court.

[2] The Members of the House of Representatives who are joining the brief are listed in Appendix A.

INTRODUCTION AND SUMMARY OF ARGUMENT

Relying on the tradition of legislative prayer in the U.S. Congress, the Court in *Marsh* v. *Chambers*, 463 U.S. 783, 791–92 (1983), rejected a challenge to legislative prayer in Nebraska, holding that invoking "Divine guidance" to solemnize the legislative function is consistent with the historic traditions of the U.S. Congress and is otherwise a "tolerable acknowledgment of beliefs widely held among the people of this country."

Amici agree with the holding in *Marsh*. *Marsh* correctly held that opening a legislative session with prayer delivered for the legislators poses "no real threat" under the Establishment Clause. *Id.* at 795. *Marsh* was also correct to hold that the courts should not parse the content of legislative prayer unless there is an "indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794–95.

This case, however, presents a setting and context very different from that considered in *Marsh*. The tradition of legislative prayer discussed in *Marsh* involves relatively brief invocations delivered for legislators to open proceedings that private citizens attend only as passive observers. The House also takes care to ensure that prayers do not cross the line of "advancing" one religion or "disparaging" another. *Id.* The Greece Town Board is not a purely legislative body, however, and its citizens do not observe its proceedings in a purely passive capacity. Rather, the Board makes quasi-adjudicatory

decisions regarding the property rights of individual citizens appearing before it (*e.g.*, by granting or denying business licenses and zoning permits) and the citizens advocate their views directly to the Board on legislative issues. Private citizens are therefore active participants in Board meetings. Further, and also unlike in *Marsh*, the sectarian prayers at issue here were directed *at* those citizens and, in many instances, the citizens were asked to participate in those prayers.

The Court should recognize these important differences and apply *Marsh* in a manner that ensures that the Establishment Clause protects citizens who are participating in important government functions—whether town board meetings, federal agency hearings, or court proceedings—from being asked to participate in sectarian prayers. Whether such practices are deemed to "advance" religion under *Marsh*, or to be "coercive" under *Lee* v. *Weisman*, 505 U.S. 577 (1992), they violate the Establishment Clause. This protection does not undermine the ability of local town boards or other government entities to open their sessions with prayer. Rather, it simply requires that they refrain from asking private citizens participating in important government functions to take part in sectarian prayers.

The Court also should decline the requests of several *amici* in support of Petitioner to use this case to overrule *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989), and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). *See, e.g.*, Members of Cong. Supporting Pet'r Br. at 8–32; Ctr. for Constitutional Jurisprudence Br. at 16–19; Am. Civil Rights Union Br. at 4–5, 17.

There is no need for the Court to do so because *Allegheny* and *Lemon* do not concern legislative prayer. This case also does not implicate the *Allegheny* "endorsement" test because it involves a context in which the risk of coercion clearly exists. This case therefore does not present the very different question of when, even if no such coercion is present, a prayer practice violates the Establishment Clause because it is so overtly sectarian that it is deemed to "endorse" under *Allegheny*, or "advance" under *Marsh*, one particular religion over another.

Finally, we disagree with the narrow "coercion" test proposed by Petitioner and *amici* in support of Petitioner because it would sanction government endorsements of religion in a broad range of contexts, including requiring citizens participating in important government functions to take part in sectarian prayer so long as they are free to leave those functions. Respectfully, this puts the burden in the wrong place. Our citizens should not be encouraged to reduce their participation in our democratic institutions to avoid having to take part in sectarian prayers. Rather, the long tradition of legislative prayer in this country can be preserved in a manner tolerant of the beliefs of all our citizens.

ARGUMENT

I. THE SETTING AND CONTEXT IN WHICH "LEGISLATIVE" PRAYER IS CONDUCTED IS CRITICAL UNDER *MARSH*

Marsh addressed a challenge by a member of the Nebraska State Legislature to prayers delivered by a

state-employed chaplain who was paid out of public funds. Relying on the historic practice of legislative prayer before the U.S. Congress, the Court rejected that challenge because of the "unique history" of "legislative prayer" in the United States. 463 U.S. at 790–91.

Marsh considered three "features" of the Nebraska practice. *Id.* at 792–93. The first two features are not relevant here; they concerned the use of a single chaplain from one denomination and the taxpayer funding of that chaplain. The third feature—the content of the prayers—was not deemed problematic because "there [was] no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794–95. On this record, the Court held that legislative prayer that "invoke[s] Divine guidance on a public body . . . is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 791–92.

Because the history of legislative prayer in the U.S. Congress was critical to the Court in *Marsh*, it is important to understand the setting and context of those practices before applying *Marsh* here. Congress is a legislative body that does not adjudicate the rights of the individual citizens who observe its deliberations, and the public does not participate in those deliberations. The public is not even allowed on the floor of the House during legislative sessions. Clauses 1 through 5 of Rule IV of the Rules of the House of Representatives ("House Rules"), 113th Cong., 1st Sess. (2013) (only certain enumerated persons acting in official capacities and

who possess official designations are admitted to the Hall of the House). "All others are rigidly excluded—not only from where Congress sits, but from most adjoining rooms as well." U.S. Capitol Historical Soc'y, *We, the People: The Story of the United States Capitol* 123 (16th ed., 2011). House Members also cannot introduce or recognize citizens who are observing from the spectator gallery. Clause 7 of House Rule XVII.

Consistent with the fact that attending citizens are mere passive observers, prayers in the House are delivered for the Representatives themselves, not those citizens. *See* Office of the Chaplain, U.S. House of Reps., *Chaplain Brochure*, http://chaplain.house.gov/chaplaincy/chaplain_brochure.pdf (last visited Sept. 18, 2013) ("The Chaplain prays daily for the Members of the U.S. House of Representatives and for the Nation, and ministers to the spiritual needs of the congressional community."); *see also* Indiana and Other States Br. at 17 (prayers are offered "to an elected assembly"); *c.f.* U.S. Senators Supporting Pet'r Br. at 2 ("Instead of debate, senators reflect on their duty to represent every constituent, mindful of the Nation's core values and their need for divine assistance in carrying out their responsibilities."). Similarly, the Nebraska legislative prayer at issue in *Marsh* was characterized as "an internal act that is . . . directed at the governmental unit itself or its own members." *Chambers* v. *Marsh*, 504 F. Supp. 585, 588 (D. Neb. 1980).

The setting and context of local board meetings is decidedly different. Town boards typically perform quasi-adjudicatory functions that affect the property

rights of the individual citizens in attendance (*e.g.*, granting or denying business licenses and zoning permits). The meetings also typically allow citizens to participate actively in debates over legislative issues (*e.g.*, ordinances of general applicability). In New York, for instance, "[v]irtually all of a town's discretionary authority rests with the town board. . . . The town board, therefore, exercises both legislative and executive functions." N.Y. Dep't of State, *Local Government Handbook* 61 (6th ed., 2009), *available at* http://www.dos.ny.gov/lg/publications/Local_Government_Handbook.pdf. *See also Alexander* v. *Holden*, 66 F.3d 62, 65 (4th Cir. 1995) ("Local government bodies often undertake actions in different capacities, including executive, administrative, legislative, and even judicial."); William H. Baker et al., *Critical Factors for Enhancing Municipal Public Hearings*, 65 Pub. Admin. Rev. 490, 493 (Issue 4, July/Aug. 2005) (survey of city administrators found "[z]oning changes, land development, and budget matters constituted about three-fourths of all . . . public hearings"); *Diva's Inc.* v. *City of Bangor*, 411 F.3d 30, 40–42 (1st Cir. 2005) (holding that city council members acted in quasi-judicial capacity when deciding on special amusement zoning permit for plaintiff); *Omnipoint Corp.* v. *Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403, 408–09 (3d Cir. 1999) (discussing cases and holding that zoning board acted in quasi-judicial capacity when denying Omnipoint's application for a special exception under the Pennsylvania Municipalities Planning Code); *Dotzel* v. *Ashbridge*, 438 F.3d 320, 323, 327 (3d Cir. 2006) (holding municipal board members acted in a

quasi-judicial capacity when ruling on permit applications).

Rather than being passive observers, the citizens attending a local board meeting therefore often "conduct business directly with the Board." United States Br. at 23–24. *See also* Resp't Br. at 5–6 (citizens attend town board meetings to air their grievances, to seek to rezone property, and to petition to obtain special use permits); Brian Adams, *Public Meetings and the Democratic Process*, 64 Pub. Admin. Rev. 43, 44–45 (Issue 1, Jan./Feb. 2004) (stating that over 97% of cities hold public hearings to seek citizen comment about local issues). They tend to be "avid proponents [or] opponents of a measure affecting them personally," and speak "only when much is at stake for them or when they have a passionate belief about an issue." Judith E. Innes & David E. Booher, *Reframing Public Participation: Strategies for the 21st Century*, Planning Theory & Practice 419, 424 (Dec. 2004).

These differences are important under *Marsh*. Citizens observing House deliberations do not participate in those deliberations and the legislative prayers are not directed at them. This, in turn, means that any sectarian references in the short prayers given to open House deliberations cannot reasonably be said to have "coercive" effects. Moreover, the House Chaplain is careful to instruct guest prayer-givers that the "prayer must be free from . . . sectarian controversies" and cautions them that the House is comprised of "Members of many different faith traditions." Resp't Br. at App. 2a. This helps to ensure that the prayers do not cross

the line of "endorsing" or "advancing" one religion or "disparaging" another.

By contrast, when citizens appear before a local town board to participate in its deliberations—whether to protect their individual property rights or to advocate a particular legislative outcome—there is a clear risk of coercion if they are asked to participate in sectarian prayers. In this context, they are left with the choice of either feigning participation in those prayers or potentially offending officials in power by leaving or arriving conspicuously late to avoid them. This is not a choice they should have to make under the Establishment Clause.

Lee is instructive in this regard. The Court emphasized that "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support *or participate in religion or its exercise*, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" 505 U.S. at 587 (emphasis added and citations omitted). Guided by this principle, the Court in *Lee* struck down a high school graduation prayer practice where "subtle coercive pressures exist[ed,] . . . where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation [in the prayer]," *id.* at 588, and where:

> public pressure, as well as peer pressure, [is placed] on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction.

> This pressure, though subtle and indirect, can be as real as any overt compulsion. . . . There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise.

Id. at 593.

The Court in *Lee* specifically distinguished this coercive atmosphere from the legislative prayer practices at issue in *Marsh* because "[t]he atmosphere at the opening of a session of a state legislature [is such that] adults are free to enter and leave with little comment for any number of reasons." *Lee*, 505 U.S. at 597.

The setting and context of the "legislative" prayer at issue in this case present the same risk of coercion present in *Lee*. The citizens who attend Greece Town Board meetings are often active participants in those meetings, advocating for particular town policies or to protect their individual property rights. Pet'r App. 3a ("Residents and town employees attend Town Board meetings to monitor and participate in these aspects of town governance."); Resp't Br. at 5–6 (describing active participation of citizens in both the public forum and public hearing portions of the meetings); United States Br. at 23 ("Town Board differs from Congress because some members of the public attend Board meetings to conduct business directly with the Board rather than simply to observe the proceedings."); *id.* at 23–24 (showing

towns are authorized to issue special-use permits for various land-use purposes and may require the request to be presented to the Board at a hearing convened by the Board). They are, therefore, not simply passive observers "free to enter and leave with little comment for any number of reasons," *Lee*, 505 U.S. at 597.

The prayers at Greece Town Board meetings are also distinguishable from those in *Marsh* because the citizens at the Board meetings were often asked to participate in the prayers. *See* Pet'r App. 3a ("Prayer-givers have often asked members of the audience to participate by bowing their heads, standing, or joining in the prayer"); Resp't Br. at 23 (prayer-giver faces assembled citizens with his or her back to the Board); J.A. 36a (requesting that all present join in). Prayer-givers asked the audience to stand or "bow our heads" (J.A. 72a), as well as to join together in reciting the Lord's Prayer (J.A. 56a). Prayer-givers also invited the board and the audience to attend specific church events. J.A. 45a–46a, 64a–65a. One even criticized citizens who had objected to the prayers as an "ignorant" "minority." J.A. 108a.

We do not suggest that the presence of sectarian content in legislative prayer, standing alone, violates the Establishment Clause. *Marsh* permits a broad range of prayer practices so long as "the prayer opportunity has [not] been exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U.S. at 794–95. In this regard, the United States explains that the "historical practice on which this Court relied in *Marsh* . . . has included a great number of sectarian references" and that the

"government must allow the prayer-giver to deliver the prayer in accordance with his own religious beliefs." United States Br. at 20–21. The United States also argues that "[c]ourts should not be in the business of parsing the theological content or meaning of particular prayers." *Id.* at 24.

We agree with the United States that traditional legislative prayer has sometimes included sectarian references and that the courts should not be in the business of parsing theological content. However, the practices of the Greece Town Board were not problematic merely because the prayers contained sectarian content. Rather, they were problematic under *Marsh* and *Lee* because citizens actively participating in an important government function were asked to participate in those sectarian prayers. Even Petitioner concedes that the Establishment Clause can be violated if a citizen is "required to participate in [prayer] or assent to the views expressed." Pet'r Br. at 39; *see also Lee*, 505 U.S. at 597 (given the setting and context, there was "no alternative but to submit" to the "state-sanctioned religious exercise").

II. THIS CASE DOES NOT REQUIRE THE COURT TO OVERTURN LONGSTANDING PRECEDENT THAT DOES NOT CONCERN LEGISLATIVE PRAYER

Various *amici* in support of Petitioner urge the Court to use this case to overturn longstanding precedent, including *Allegheny* and *Lemon*. *See, e.g.*, Members of Cong. Supporting Pet'r Br. at 2. The Court should decline this invitation for three principal reasons.

First, this case concerns whether a particular prayer practice violates *Marsh* and *Lee*. There is no reason to overrule *other* precedents that do not concern legislative prayer. *See, e.g.*, *Lee*, 505 U.S. at 586–87 (where "controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel[led] the holding," the Court did "not accept the invitation of petitioners and *amicus* the United States to reconsider our decision in *Lemon* v. *Kurtzman*").

Second, the situations that concern these *amici* in support of Petitioner—such as the crèche displays in *Allegheny* or the Ten Commandments displays in *McCreary County* v. *ACLU*, 545 U.S. 844 (2005)—present different considerations than legislative prayer. *Marsh* recognized the unique historic role of legislative prayer and therefore declined to apply Establishment Clause jurisprudence developed in other contexts. There is no reason to revisit that decision in this case.

Third, the "coercion test" advocated by *amici* in support of Petitioner is not consistent with the opinions upon which it purports to rest. Justice Kennedy's *Allegheny* opinion articulated "two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; *and* it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" 492 U.S. at 659 (Kennedy, J., concurring in part and dissenting in part) (emphasis added) (quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 678 (1984)).

Amici in support of Petitioner do not actually apply these "two limiting principles," but rather replace them with a "single workable test" (*e.g.*, Members of Cong. Supporting Pet'r Br. at 9) that appears to discard the second principle. As a result, even "[w]here the overwhelming predominance of prayers offered are associated, often in an explicitly sectarian way, with a particular creed, and where the town takes no steps to avoid the identification, but rather conveys the impression that town officials themselves identify with the sectarian prayers and that residents in attendance are expected to participate in them," Pet'r App. 26a, certain *amici* in support of Petitioner would deem those facts irrelevant—apparently for the sole reason that citizens can simply leave if they disagree. As Justice Kennedy explained in his *Allegheny* opinion, the Establishment Clause requires a court to consider whether such a practice provides "direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or *tends to do so.*'" *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in part and dissenting in part) (emphasis added) (quoting *Lynch*, 465 U.S. at 678). Moreover, *Lee* rejects the notion that simply giving citizens the option to leave an important government-sponsored function to avoid sectarian prayer saves the practice under the Establishment Clause. 505 U.S. at 588.

This one-prong test also puts the burden in the wrong place. Under this proposed test, a town board would presumably be free to *endorse* a particular religion and ask its citizens to *participate* in prayers of that faith—so long as those in attendance were free to leave once the prayers commenced and the town did not actually attempt to "convert" them.

E.g., Members of Cong. Supporting Pet'r Br. at 35. This notion not only conflicts with *Marsh* and *Lee*, but also would weaken participation in our democratic institutions by shifting the burden to the public to avoid participating in government functions in order to avoid having sectarian prayers directed at them.

In the end, there is simply no need to use this case to overturn other precedents because all sides agree that *Marsh* articulates the general rule applicable to legislative prayer cases; they only differ on *how* it should be applied. We do not disagree with the United States that *Marsh* contemplates limited judicial review of traditional legislative prayer, but this case concerns different practices and those differences matter under *Marsh* and *Lee*. When citizens participating in important government functions are asked to participate in sectarian prayers, there is a legitimate question regarding whether the practice violates the Establishment Clause (*e.g.*, whether the government had sanctioned a recurring coercive practice as opposed to an isolated occurrence). This inquiry does not create "chaos" (Members of Cong. Supporting Pet'r Br. at 8, 12), but simply reflects the fact that this is a "sensitive area" where the Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion." *Lynch*, 465 U.S. at 679; *Salazar* v. *Buono*, 559 U.S. 700, 722 (2010) ("To date, this Court's jurisprudence in this area has refrained from making sweeping pronouncements, and this case is ill suited for announcing categorical rules."). Other cases may present more difficult facts—such as if there is no coercive element but the prayer practice nonetheless

is so overtly sectarian that it crosses the line of "endorsing" or "advancing" a particular religion—but this case does not.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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September 23, 2013

APPENDIX

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APPENDIX A

The following Members of the United States House of Representatives currently serving in the 113th Congress have joined this brief as *amici curiae* in support of Respondents Susan Galloway and Linda Stephens.

These Members of Congress are the Honorable:

1. Rep. Jerrold Nadler
2. Rep. John Conyers, Jr.
3. Rep. Robert C. ("Bobby") Scott
4. Rep. Theodore E. Deutch
5. Rep. George Miller
6. Rep. Alcee L. Hastings
7. Rep. Robert E. Andrews
8. Rep. Michael M. Honda
9. Rep. Diana DeGette
10. Rep. Mark Takano
11. Rep. Eleanor Holmes Norton
12. Rep. Keith Ellison

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
SEP 23 2013
OFFICE OF THE CLERK

No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE, NEW YORK,

Petitioner,

v.

SUSAN GALLOWAY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL CONFERENCE FOR COMMUNITY AND JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the government opens up a limited public forum when it begins public meetings with a prayer given by a prayer-giver selected by the government and no other persons are permitted to offer any speech.

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BRIEF OF THE NATIONAL CONFERENCE FOR COMMUNITY AND JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*[1]

The National Conference for Community and Justice was founded in 1927 as the National Conference for Christians and Jews, in response to a rise in racism, anti-Catholicism, and anti-Semitism in America. *See Aims to Harmonize National Groups, Conference Outlines a Wide Campaign of Goodwill Among All Classes*, N.Y. Times, Dec. 11, 1927, at 1. Its founders were leading citizens from various faiths, including Benjamin N. Cardozo, Charles Evans Hughes, and Theodore Roosevelt. *Id.*

Founded more than 80 years ago, the Connecticut/western Massachusetts Chapter was the first of many chapters of the National Conference of Christians and Jews. In the 1990s, the name of the parent organization was changed to the National Conference for Community and Justice to better reflect the breadth and depth of its mission, the growing diversity of our country, and our need to be more inclusive. In the summer of 2005, the parent organization closed its doors, but many of the chapters continued. As the oldest chapter, the Connecticut/western Massachusetts Chapter took the name National Confer-

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[1] The parties in the case have consented to the filing of this *amicus* brief. Blanket letters of consent are on file with the Court. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

ence for Community and Justice (hereinafter, "NCCJ") and continues its mission of promoting understanding and respect among all races, religions, and cultures. The NCCJ focuses many of its activities in Connecticut and western Massachusetts, but it also has national programs.

The document now entitled *When You Are Asked to Give Public Prayer In a Diverse Society -- Guidelines for Civic Occasions* (hereinafter, *Guidelines for Civic Occasions*)[2] (App. 1a-7a) was drafted over 20 years ago by a group of interfaith leaders from diverse religious traditions working with the National Conference of Christians and Jews. There have been language changes over the years, but the purpose and spirit of the *Guidelines* remain the same. Through the *Guidelines*, the NCCJ actively promotes the use of inclusive, nonsectarian language when faith leaders and others are called upon to present prayer at civic occasions, including legislative sessions. NCCJ has an interest in this case because the Petitioner and its *amici curiae* take the position that legislative bodies that engage in prayer cannot encourage inclusive prayer without infringing the rights of volunteer prayer-givers under the Free Speech Clause of the First Amendment.

STATEMENT OF THE CASE

In 1999, at the direction of John Auberger, the Supervisor of the Town of Greece, New York (the "Town"), the Town began the practice of prayer at its monthly town board meetings. Pet. App. 3a. Au-

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[2] *See* National Conference for Community and Justice, *Guidelines for Civic Occasions*, http://www.nccj.org/whatwedo/documents/PUBLICPRAYERGUIDELINES81610docx.pdf.

berger himself led a "moment of silent prayer" at the first three board meetings in 1999 (J.A. 26a-27a), and thereafter relied on clergy or others to give the prayers. Typically, Auberger called each meeting to order, the town clerk called the roll of board members, Auberger asked the audience to rise for the Pledge of Allegiance, the audience recited the Pledge, Auberger introduced the prayer-giver for the month, the prayer-giver offered the prayer over the public address system, and then the meeting continued. Pet. App. 3a-4a. Auberger often thanked the clergy person who offered the prayer as "our chaplain for the month" and sometimes gave them a plaque. *See, e.g.*, J.A. 27a, 29a-39a ("chaplain for the month"); J.A. 33a-37a (awarding plaques).

There can be no question that the Town permitted prayer and only prayer during the time on the agenda devoted to prayer. The official agenda and minutes for the meetings consistently listed "prayer" right after the Pledge of Allegiance. Pet. App. 3a; C.A. A448- A570; C.A. A312- A446. At 124 of the 127 meetings in the record, Auberger called for "prayer" when introducing the prayer-giver.[3] J.A. 26a-143a. At two meetings, Auberger omitted the word "prayer," but implicitly called for prayer by introducing clergy, who offered prayers. J.A. 92a, 101a. At the remaining meeting, another board member called for "prayer" in Auberger's absence. J.A. 102a.

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[3] The court of appeals stated that it could locate transcripts of only 121 prayers in the record. Pet. App. 6a n.1. But by our count, there are 127 town board meetings reflected in the record from January 1999 through June 2010 and a prayer or moment of silent prayer was offered at each one of them, with two prayers offered on August 20, 2002.

There is no dispute that the Town chose the prayer-givers for the meetings. Pet. App. 4a-5a. All prayers through 2007 were offered by Christian clergy, except five where Auberger asked members of the board and others in attendance to "remain standing for a moment of silent prayer." J.A. 26a, 29a 45a, 67a.[1] From 2008 through June of 2010, all prayers were offered by Christian clergy, except for four occasion in 2008, when prayers were offered by a member of the Jewish religion (twice), a member of the Wiccan religion, and member of the Bahá'í religion, and they were all invited by the board. Pet. App. 4a-5a.

The content of the prayer at all 127 town meetings was exclusively prayer. There was never a reading of the Declaration of Independence or any other civic document, piece of literature, or other statement of any kind.

The record contains evidence of the divisive nature of public prayer. On one occasion, the prayer-giver gave thanks for the privilege to live in Greece and noted that "My sister doesn't get to live in a town where there's a supervisor and councilmen that are God-fearing people." J.A. 79a. A similar comment was made in August 2009, after the filing of this litigation, when a pastor thanked the town supervisor and board "for this opportunity to pray and to open up our meetings in prayer. On behalf of all God-fearing people in this town, we appreciate it." J.A. 137a. On October 16, 2007, in an obvious reference to the Respondents in this case, who by then had complained about the Town's prayer practice,

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[1] On one occasions, two prayers were offered at a meeting, one by a Board member and one by a clergy person. J.A. 66a-67a.

the prayer-giver said of them that "they are in the minority and they are ignorant . . . ." J.A. 108a.

In addition to the portion of the agenda at each board meeting dedicated to prayer, there was a separate part of each meeting dedicated to a "public forum." C.A. App. A448-A570.

SUMMARY OF ARGUMENT

This brief responds to the Town's argument that (1) it opened up a limited public forum for "private individuals . . . to open meetings of its legislative body in a manner consistent with their own consciences" and (2) the Free Speech Clause does not permit it to "censor[] its citizens views based on their religious content without engaging in impermissible viewpoint discrimination." Pet. Br. 44, 53. This *amicus* is compelled to respond to this argument because, apart from its factual and legal flaws, if adopted by the Court it would have the effect of prohibiting legislative bodies that engage in prayer from suggesting or requiring that the prayer-giver offer inclusive prayer that respects the diversity of views on matters of religion.

1. This Court should reject the arguments made by the Town that by enlisting volunteer chaplains to open town meetings with prayer, the Town opened up a limited public forum and could not restrict the sectarian content of the prayers. This argument was never made in the district court or the courts of appeals and for that reason alone should not be considered.[5] And the argument has no merit. There is

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[5] In the courts of appeals, Petitioner in a footnote suggested that the Town's prayer practice "had many characteristics of a

nothing in the record to suggest that the Town opened up a limited public forum. The undisputed facts show that it decided to have prayer at its town board meetings and then it enlisted prayer-givers to give that prayer, one per meeting. The Town never implemented a policy or a practice of opening up the prayer portion of the meeting for speech by members of the general public or anyone other than the designated prayer-givers. This falls far short of "intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)). And by limiting the speech of the prayer-givers to prayer, the Town engaged in impermissible viewpoint discrimination. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). This restriction permits virtually no expression of opinion, anti-religious comments, non-religious comments, or any other speech. It discriminates against all viewpoints other than the one promoted by the Town -- prayer. This is a separate, compelling reason why the Court should hold that the Town did not open a limited public forum.

2. A decision by this Court that the Town opened up a limited public forum would suggest that public bodies that engage in public prayer cannot require volunteer prayer-givers to limit the overtly sectarian content of prayers. This is not only wrong as a matter of law, but also it would be very bad public policy. Overtly sectarian prayer offends citizens who do not share the beliefs of the religious majority, divides communities based on religious belief, and sends the

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limited public forum" (Appellees' C.A. Br. 39 n.16), but never made the argument, either in that court or the district court.

message that the government prefers members of the religious majority. The Court's decision in this case should not foreclose public bodies from making prayer inclusive and nonsectarian.

ARGUMENT

I. BY ITS PRAYER PRACTICE THE TOWN DID NOT OPEN UP A LIMITED PUBLIC FORUM; AS A RESULT THE TOWN COULD HAVE LIMITED THE SECTARIAN REFERENCES IN THE PRAYER WITHOUT INFRINGING ANY RIGHTS UNDER THE FREE SPEECH CLAUSE.

The Town claims that "[t]his case can begin and end with *Marsh*," Pet. Br. 12, but then it attempts to raise an issue not presented in *Marsh*, namely, the alleged Free Speech rights of the volunteer chaplains it enlisted to offer legislative prayer. The Town claims that it decided "to offer a prayer opportunity to all citizens, regardless of faith," that its "prayer policy offers private individuals a forum in which to open meetings of its legislative body in a manner consistent with their own consciences," and that it "could not have censored its citizens' views based on their religious content without engaging in impermissible viewpoint discrimination." Pet. Br. 16, 44, 53. By this argument the Town suggests that it opened up a limited public forum. Pet. Br. 52. But, in a signal of the weakness of its position, the Town never actually argues that it opened up a limited public forum. In fact, the Town did not open up a limited public forum, and that concept does not fit the facts of this case. The Town's prayer practice was the antithesis of a limited public forum.

The framework governing limited public forums is well established by the Court's precedents. Lim-

ited public forums are contrasted with traditional public forums, such as parks and streets, "which by long tradition or government fiat have been devoted to assembly and debate . . . ." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). In a limited public forum, "the State is not required to and does not allow persons to engage in every type of speech." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001). "The State may be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics.'" *Id.* (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

There are two related reasons why the Town's prayer practice cannot qualify as a limited public forum. First, "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (citing *Perry*, 460 U.S. at 46). The Court looks to the "policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Id.* (citing *Perry*, 460 U.S. at 46). The Court "has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent." *Id.* Under these standards, the Town here did not open up a public forum. There is no evidence that the Town intended to open up a public forum, legislative prayer is incompatible with expressive activity, and the cases that have recognized a limited public forum all involved multiple groups or speakers. A government practice of sponsoring speech by a single speaker -- like the Town's

prayer practice here -- could never qualify as a limited public forum.

Second, in a limited public forum the government may not "discriminate against speech on the basis of its viewpoint." *Rosenberger*, 515 U.S. at 829 (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993); *Perry*, 460 U.S. at 46; *R.A.V. v. St. Paul*, 505 U.S. 377, 386-88 (1992)).[6] A practice of permitting only one speaker chosen by the government per meeting to speak on a narrow topic chosen by the government is not viewpoint neutral -- it is an extreme example of viewpoint discrimination.

A. THE TOWN DID NOT OPEN UP A LIMITED PUBLIC FORUM.

The record contains no support for the Town's suggestion that what it did was "open a forum" for "any town resident," "its citizens," or "private individuals" "from any faith tradition (or no faith tradition)" "to deliver an opening statement according to the dictates of their own conscience and free from any form of guidance or censorship." Pet. Br. 2, 44, 52, 53. The suggestion is wrong in almost every particular. There was never a communication from the Town at any meeting, in any agenda, or in any other way that members of the public could come forth and offer a prayer, much less something other than prayer. The practice always was that the Town arranged for one prayer-giver per meeting. There was never an opportunity opened for any person other than the

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[6] Also, the "the State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum . . . .'" *Rosenberger*, 515 U.S. at 829 (quoting *Cornelius*, 473 U.S. at 804-06).

designated prayer-giver to be heard during the prayer portion of the meeting. The prayer practice was controlled by the Town in every respect other than the content or tone of the prayers. Under these circumstances, there is no evidence in the record to support a conclusion that the Town "intentionally open[ed] a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802.

The Court in *Perry* rejected the argument that a school district had opened up a limited public forum when it gave access to teachers' mailboxes to the union that was the exclusive representative for the teachers but denied the opportunity to a rival union. The Court said that "[i]f by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public, then PLEA could justifiably argue a public forum has been created," but that "was not the case," as there was "no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public." 460 U.S. at 47. While the mailboxes had been made available to "some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations," the Court held that "[t]his type of selective access does not transform government property into a public forum." *Id.*

In *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the Court rejected the argument that by permitting high school students to elect a student to give an invocation before home football games the school district had opened up a limited public forum. In support of its holding, the Court noted that the Santa Fe school officials simply do not "evince either 'by policy or by practice' any intent to open [the pregame ceremony] to 'indiscriminate use,'

. . . by the student body generally." *Id.* at 303 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988); *Perry*, 460 U.S. at 47). "Rather, the school allows only one student, the same student for the entire season, to give the invocation." *Id.* The Court noted that "the statement or invocation . . . is subject to particular regulation that confines the content and topic" of the message. *Id.* The Court in *Santa Fe* contrasted these facts with *Perry*, where it had "rejected a claim that the school had created a limited public forum in its school mail system despite the fact that it had allowed far more speakers to address a much broader range of topics than the policy at issue here." *Id.* The Court repeated its observation from *Perry*: "selective access does not transform government property into a public forum." *Id.* (quoting *Perry*, 460 U.S. at 47).

This case is governed by *Perry* and *Santa Fe*. Here, there was no opening of the prayer portion of the meeting for "indiscriminate use by the general public," *Perry*, 460 at 47, and the extent of the government control over the message was at least as great as in *Santa Fe*. Whereas the school district in *Santa Fe* "encourage[d] the selection of a religious message," 530 U.S. at 307, here the Town *mandated* a religious message and only one type of religious message -- prayer. Under *Perry* and *Santa Fe*, the Court should reject the Town's suggestion that it opened up a limited public forum.

None of the Court's precedents offer any support for the notion that a limited public forum could arise when the government permits a single speaker at an event. As the Court said in *Pleasant Grove City v. Summum*, 555 U.S. 460, 478 (2009), "[t]he forum doctrine has been applied in situations in which gov-

ernment-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program."

All of the cases where the Court has recognized limited public forums have been where the government opened up its property to use by multiple groups or persons. *See, e.g., Rosenberger*, 515 U.S. at 822, 825 (student organizations could receive university funds for a broad range of extracurricular activities); *Lamb's Chapel*, 508 U.S. at 386, 391 (school district made its facilities available for use by the general public after school for a wide range of purposes pertaining to the welfare of the community); *Good News Club*, 533 U.S. at 102 (school district made its buildings available after school to the general public for uses pertaining to the welfare of the community); *City of Madison Joint Sch. Dist. No. 8 v. Wisconsin Pub. Emp't Relations Comm'n*, 429 U.S. 167, 169-75 (1976) (public comment section at school board meeting was open to the public).

Implicit in these cases and in the concept of a limited public forum is the discussion of ideas, which is the *sine qua non* of a forum. The dictionary defines "forum" as "an organization that holds public meetings for the discussion of subjects of current interest" and "a public meeting place for open discussion." Webster's Third New International 896 (1986). With a single prayer-giver per meeting there can never be a discussion of ideas. The concept of a limited public forum simply does not fit the facts of this case. *Cf. Summum*, 555 U.S. at 478 ("Public forum principles . . . are out of place in the context of this case.") (*quoting U.S. v. Am. Library Ass'n.*, 539 U.S. 194, 205 (2003) (plurality opinion)). The Solici-

tor General agrees with this conclusion. *Amicus* Br. for the U.S. 12 n. 4.

B. The Town Could Not Lawfully Open Up a Public Forum Limited to Prayer, Because Prayer Is Not a Viewpoint Neutral Limitation.

"[T]he Court has permitted restrictions on access to a limited public forum . . . with this key caveat: Any access barrier must be reasonable and viewpoint neutral." *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings College of the Law v. Martinez*, 130 S. Ct. 2971, 2984 (2010) (citing *Rosenberger*, 515 U.S. at 829; *Good News Club*, 533 U.S. at 106-07; *Lamb's Chapel*, 508 U.S. at 392-93; *Perry*, 460 U.S. at 46). The Town here could not open up a limited public forum for one prayer-giver a month, because that restriction is not viewpoint neutral. It discriminates against all viewpoints except prayer. It forecloses anyone with a different viewpoint, such as a disgruntled citizen who might want to say words to the effect of "I curse this public body," "a plague on all of you," or any other statement of opinion about the town board. The Court at times has suggested that government could open up a limited public forum for the discussion of certain topics, *see, e.g., Perry*, 460 U.S. at 45 n. 7 ("A public forum may be created for limited purposes such as . . . the discussion of certain subjects, *e.g., City of Madison Joint Sch. Dist. v. Wisconsin Pub. Emp't Relations Comm'n* (school board business)"), but it has never suggested that a limited public forum could be opened so narrowly as to preclude all but a single viewpoint.

The Town's prayer practice also discriminates in favor of a religious viewpoint. In an unbroken line of decisions, the Court has recognized that government

engages in viewpoint discrimination when it treats speech differently for purposes of a limited public forum based on its religious content. *See Good News Club*, 533 U.S. at 112 ("speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."); *Rosenberger*, 515 U.S. at 828-37 (university's refusal to fund a student publication because the publication addressed issues from a religious perspective violated the Free Speech Clause); *Lamb's Chapel*, 508 U.S. at 393 (1993) ("it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint."); *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981) ("In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions."). This case differs from the cited precedent only in that the government seeks to favor religious speech. This violates the rule on viewpoint neutrality. Viewpoint neutrality is (at least) a two-way street. The government can neither disfavor nor favor religious speech. *Cf. Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (plurality opinion) ("Of course, giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate . . . the Free Speech Clause, since it would involve content discrimination.") (parentheses omitted).

If the Town's purpose truly is to solemnize its meetings, and assuming for the sake of argument

that it could and did open up a limited public forum for that purpose, it could achieve that purpose with religious speech or nonreligious speech. But it only permitted religious speech, not nonreligious speech that could be used for the same purpose, such as a reading of the Declaration of Independence, Learned Hand's "Spirit of Liberty" speech, the words to "This Land is Your Land," or countless other nonreligious readings that would be appropriate to solemnize a public meeting. By foreclosing all nonreligious speech, the Town clearly engaged in viewpoint discrimination.

* * *

For all these reasons, the Town did not open up a limited public forum by its prayer practice. For that reason, the prayer-givers enlisted by the Town have no Free Speech right to offer prayer of their own choosing. The Town could have limited the prayers given at its town meetings without violating the Free Speech Clause.

II. A Decision By The Court Recognizing A Limited Public Forum In The Context Of Legislative Prayer Would Prevent Public Bodies From Promoting Non-Sectarian Prayer As Recommended In The *Amicus's Guidelines For Civic Occasions.*

The NCCJ is concerned with the Town's argument that, by sponsoring volunteer chaplains, one per meeting, to offer an opening prayer, the Town opened up a limited public forum and that it could not require or encourage inclusive prayer. Pet. Br. 53. This suggests that the *NCCJ Guidelines for Civic Occasions* could not be used with prayer-givers in legislative sessions without risking a violation of the

Free Speech Clause. The NCCJ believes that result would be wrong both as a matter of law, for the reasons discussed *supra* at pp. 7-15, and as a matter of sound public policy.

As explained *supra* at pp. 1-2, as part of its mission of promoting understanding and respect among all races, religions, and cultures, the NCCJ and its former parent organization have for more than 20 years published the *Guidelines*. As stated in the *Guidelines*, "Individuals who lead the general community in prayer have the responsibility to be clear about the public nature of the occasion and respectful of the composition of the audience. Prayer on behalf of the entire community should be easily shared by listeners from different faiths and traditions." App. 3a.

The NCCJ believes that when prayer is presented in public settings, including legislative sessions, it "can and should bind a group together in a common concern. However, it can become unintentionally divisive, when forms or language exclude persons from faith traditions different than that of the speaker." *Id.* The NCCJ seeks to promote inclusive prayer for public, secular occasions. Inclusive prayer is nonsectarian, and can include invocations to "Almighty God," "Our Maker," "Source of All Being," "Creator God," "Creator and Sustainer," and similar nonspecific references to God and closing words like "Hear Our Prayer," or "Amen." *Id.*

The NCCJ takes the position that, if a public body decides to present public prayer, it should require or encourage inclusive prayer. Inclusive prayer is much less likely than overtly sectarian prayer to implicate core concerns of the Establishment Clause, including offense to the beliefs of the minority, the

suggestion that the government takes sides in matters of religion, and government encouragement of sectarian conflict.

Can there be any question that overtly sectarian prayer in a legislative setting is highly offensive to persons outside of the religious majority? As Judge Wilkinson said, "To . . . Jewish, Muslim, Bahá'i, Hindu, or Buddhist citizens[,] a request to recognize the supremacy of Jesus Christ and to participate in a civic function sanctified in his name is a wrenching burden." *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 354 (4th Cir. 2011) (quoting *Amicus* Br. of Am. Jewish Congress, *et al.* 8). In this respect, there is a huge difference between freely attending and possibly participating in a religious event or occasion outside of one's own faith, such as a wedding of friends from a different religious tradition, and being forced to observe or join as the price of admission to participation in local government.

Overtly sectarian prayer suggests to persons outside the religious majority that they are not welcome as full participants in the affairs of government. This is not right. "[C]itizens should come to public meetings confident in the assurance that government plays no favorites in matters of faith but welcomes the participation of all." *Joyner v. Forsyth Cnty.*, 653 F.3d at 355.

Overtly sectarian prayer also can lead to the impression that the government fosters or takes sides in sectarian conflict. As Justice O'Connor said in her *McCreary* concurrence, "Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that easily might spill over into suppression of rival beliefs." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 883 (2005). We see evidence of

that type of division in the record of this case, with two different members of the clergy twice in public recognizing a division in the community between those who are "God-fearing" and those who are not and a third clergy person calling those who object to sectarian prayer "ignorant." J.A. 79a, 108a, 137a.

The value of inclusive prayer has been recognized by many organizations, including the United States House of Representatives (Resp. Br. App. 1a-3a) and the National Conference of State Legislatures ("NCSL"). The NCSL publishes "Basic Guidelines" that encourage inclusive legislative prayer: "In opening and closing the prayer, the leader should be especially sensitive to expressions that may be unsuitable to members of some faiths." National Conference of State Legislatures, *Prayer Practices* 2, http://www.ncsl.org/documents/legismgt/ilp/02tab5pt7.pdf. The NCSL in its Basic Guidelines identifies the National Conference for Christians and Jews, NCCJ's former parent organization, as the source for the "Basic Guidelines."

Inclusive prayer is feasible by clergy and lay people. It is used frequently outside of legislative sessions. By way of example, two of the major service clubs promote inclusive prayer -- Rotary International and Kiwanis International. According to the *ABCs of Rotary*, "In many Rotary clubs, it is customary to open weekly meetings with an appropriate invocation or blessing. Usually such invocations are offered without reference to specific religious denominations or faiths. Rotary policy recognizes that throughout the world Rotarians represent many religious belief, ideas, and creeds." *See* Cliff Dochterman, Invocations at Club Meetings, *reprinted in The ABCs of Rotary* (2003), http://www.rotary9790.

org.au/info/ftp/abcsofrotary.pdf. International Rotary assemblies and conventions traditionally begin with a silent invocation, in which all persons are invited to seek divine guidance and peace "each in his own way." *Id.* Kiwanis International publishes a brief compilation of sample non-sectarian invocations as guidance for local meetings. *See* Kiwanis International, *Invocations for Kiwanis Occasions*, http://community.kiwanisone.org/media/p/5723.aspx. These prayers are directed to a "Heavenly Father," include petitions focusing on unifying themes, and contain no sectarian references.

Concern has been suggested that sectarian prayer is difficult to identify. Pet. Br. 42-44. To the contrary, the record in this case proves that sectarian prayer is readily identifiable, including prayers offered in the name of Jesus Christ and other obvious sectarian references, including a recitation of the "Our Father." J.A. 56a. The fact is that clergy and even lay leaders know what it means to offer sectarian prayer and if asked to refrain, they can do so. Our experience as citizens gives us many examples of nonsectarian prayer.[7]

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[7] Readily available examples of appropriate non-sectarian prayer include: Archbishop Charles J. Chaput, Invocation Delivered at Philadelphia City Council Meeting (Oct. 20, 2011), *available at* http://archphila.org/archbishop-chaput/statements/citycouncil.php (last visited Sept. 23, 2013); United Kingdom Chief Rabbi Jonathan Sacks, Invocation delivered at U.S. Senate (Nov. 2, 2011), *available at* http://www.jpost.com/Jewish-World/Jewish-Features/UK-Chief-Rabbi-delivers-Invocation-prayer-at-US-Senate (last visited Sept. 23, 2013); Rev. Dr. Luis Leon, Invocation Delivered at the Inauguration of President George W. Bush (Jan. 20, 2005), available at http://www.beliefnet.com/News/2005/01/A-New-Beginning-In-Our-

The NCCJ understands that certain members of the Christian faith sincerely believe that they cannot pray unless they make specific reference to the prayer being given in the name of Jesus Christ. Of course they can always offer that portion of the prayer in their hearts, silent to the audience, if they wish to offer inclusive prayer in a public legislative setting. But if they cannot do that, then they should refrain from offering public prayer. As stated in the *Guidelines*, "When asking a person to offer a prayer on a civic occasion, it is important to explain clearly the need for general and inclusive prayer. Some persons are reluctant to offer Inclusive Public Prayer. This position should be respected, and the individual should be given the option of gracefully declining the invitation." App. 4a.

Any legislative prayer practice presents some risk that the practice will prove divisive, communicate a message that the government is aligned with religion, or suggest to some people that they are not welcome as full participants in the affairs of government, but inclusive prayer is far less likely to do so than overtly sectarian prayer. This Court's ruling should promote efforts by public bodies to encourage inclusive prayer.

CONCLUSION

For the foregoing reasons, if the Court reaches the issue of whether the Town by its prayer practice opened up a limited public forum, the Court should hold that the Town did not open up a limited public forum.

Journey-As-A-People-And-A-Nation.aspx (last visited Sept. 23, 2013).

Respectfully submitted,

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SEPTEMBER 23, 2013

APPENDIX

APPENDIX A

National Conference for Community and Justice

"Guidelines for Civic Occasions"

WHEN YOU ARE ASKED TO GIVE PUBLIC PRAYER

IN A DIVERSE SOCIETY

nccj

The National Conference for Community and Justice

Guidelines for Civic Occasions

PUBLIC PRAYER IN A DIVERSE SOCIETY

Guidelines for Civic Occasions

Faith leaders and others are sometimes called upon to present prayer at civic occasions including club meetings, legislative sessions, graduations, political rallies, testimonial dinners and community forums. Prayer in such secular settings can and should bind a group together in a common concern. However, it can become unintentionally divisive, when forms or language exclude persons from faith traditions different than that of the speaker.

Individuals who lead the general community in prayer have the responsibility to be clear about the public nature of the occasion and respectful of the composition of the audience. Prayer on behalf of the entire community should be easily shared by listeners from different faiths and traditions.

Inclusive Public Prayer is nonsectarian, general and carefully planned to avoid embarrassments and misunderstandings. On civic occasions, it is authentic prayer that also enables people to recognize the pluralism of American society.

When asking a person to offer a prayer on a civic occasion, it is important to explain clearly the need for general and inclusive prayer. Some persons are reluctant to offer Inclusive Public Prayer. This position should be respected, and the individual should be given the option of gracefully declining the invitation.

INCLUSIVE PUBLIC PRAYER

- seeks the highest common denominator without compromise of conscience

- calls upon God on behalf of the particular public gathered; avoids individual petitions

- uses forms and vocabulary that allow persons of different faiths to give assent to what is said

Sensitivity to the public's diversity and a commitment to inclusiveness should also apply to the content of meditations or addresses on civic occasions and to the selection and performance of music.

- uses universal, inclusive terms for deity rather than particular proper names for divine manifestations.
  Some opening invocations are "Almighty God", "Our

Maker" "Source of All Being", "Creator God" or "Creator and Sustainer." Possible closing words are "Hear Our Prayer," "May Goodness Flourish," or, simply "Amen."

- uses the language most widely understood by the audience, unless one purpose of the event is to express ethnic/cultural diversity, in which case multiple languages can be effective.

- considers other creative alternatives, such as a moment of silence

- remains faithful to the purposes of acknowledging the divine presence, giving thanks and seeking blessing, and is not used as an opportunity to preach argue or testify.

Inclusive public prayer in a pluralistic society must be sensitive to a diversity of faiths.

Leading such prayer is both a privilege and a responsibility.

nccj The National Conference for Community and Justice of Connecticut and Western Massachusetts, Inc.

What is NCCJ?

The National Conference for Community and Justice (NCCJ), founded in 1927 as the National Conference of Christians and Jews, is a human relations organization dedicated to fighting bias, bigotry and racism in America. NCCJ promotes understanding and respect among all races,

religions and cultures through advocacy, conflict resolution and education.

NCCJ promotes quality inter-group relations by empowering individuals and leaders to create institutional changes that will transform communities to provide fuller opportunity for all.

NCCJ seeks to build just and inclusive communities in which people from different religious, racial, ethnic and cultural backgrounds learn to live together with mutual respect and without compromising their faiths and identities. NCCJ opens minds and opens hearts!

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AMICUS CURIAE BRIEF

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No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* REV. DR. ROBERT E. PALMER SUPPORTING PETITIONER

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BRIEF OF *AMICUS CURIAE* REV. DR. ROBERT E. PALMER SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Amicus Rev. Dr. Robert E. Palmer, a Presbyterian minister, was the chaplain of the Nebraska Legislature whose paid role and daily prayers were challenged in *Marsh* v. *Chambers*, 463 U.S. 783 (1983). In *Marsh*, this Court held that the Establishment Clause did not prohibit either Rev. Palmer's compensated position as chap-

[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and his counsel made such a monetary contribution. Petitioner and Respondents have filed letters with the Clerk's office consenting to the filing of all *amicus* briefs.

lain, his continued reappointment over sixteen years, or the content of the prayers he offered at the start of each legislative workday. *Id.* at 792-795.

The present case is of considerable interest to Rev. Palmer. The judgment below, if adopted by this Court, would effectively abrogate *Marsh*'s recognition of the propriety of Rev. Palmer's own civic contribution.[2] Rev. Palmer believes that *Marsh* was correctly decided, because legislative bodies which desire to exercise their First Amendment right to solemnly invoke divine guidance should not be impaired by court rulings that inject uncertainty and discourage assemblies from exercising that right. For the benefit of all state or local legislative assemblies, and of chaplains like Rev. Palmer, this Court should reaffirm *Marsh* and the legitimacy of legislative prayer.

Rev. Palmer has another unique interest in this case. The Second Circuit emphasized the need for a "nonsectarian" prayer practice. *E.g.*, Pet. App. 12a. *Marsh* indeed used that word—but only once, and then as a quotation of Rev. Palmer's own characterization of his prayer practice. 463 U.S. at 793 n.14. That characterization came from Rev. Palmer's deposition, which—like many of his prayers—is in the *Marsh* record in this Court. See Record on Appeal & Cross-Appeal, *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (No. 82-234) (hereinafter "*Marsh* Record"). Rev. Palmer, a defendant in *Marsh*, explained in his deposition that his prayers were simultaneously "nonsectarian" *and* that many were identifiably Christian. A prayer would be "sectarian," he explained, if it advances a particular sect or denomination within the

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[2] Rev. Palmer also filed a brief as *amicus curiae* urging the Court to grant the petition for a writ of certiorari, which petitioner's merits brief cites. See Pet. Br. 26, 47. The present brief provides further explanation for the arguments raised in Rev. Palmer's initial brief.

Judeo-Christian tradition (such as Rev. Palmer's own Presbyterianism). He did not mean, and this Court plainly did not take him to mean, that any prayer is "sectarian" unless so drained of religious content as to be of no identifiable religious tradition.[3]

Thus, the Second Circuit invoked Rev. Palmer's use of the word "nonsectarian," but did so to reach exactly the opposite result from the one this Court intended when, in *Marsh*, it quoted Rev. Palmer's language. Rev. Palmer's interest extends to ensuring that this Court is fully aware of this background to *Marsh*, so that the Second Circuit's gloss on that case may be seen as the retreat from the *Marsh* holding that it is.

SUMMARY OF ARGUMENT

1. When this Court decided *Marsh* v. *Chambers*, there was no doubt that the prayers being challenged were often "explicitly Christian." 463 U.S. 783, 793 n.14 (1983). The record before the Court was replete with Christian prayers, and dissenting justices regarded that as reason enough to strike down Nebraska's practice. But the Court refused. In full knowledge of his prayers' religious content, the Court credited Rev. Palmer's deposition statement that they were "nonsectarian"—a term understood in context to mean that the prayers did not advance a particular sect within the Judeo-Christian tradition, like Rev. Palmer's Presbyterian faith. Consistent with Rev. Palmer's description, the Court held that his prayers posed no constitutional concerns, so long as "the

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[3] As the Court noted, Rev. Palmer did omit using the name of Jesus Christ itself in 1980 in response to a Jewish legislator's request. *Marsh* v. *Chambers*, 463 U.S. 783, 793 n.14 (1983). But the record of prayers in *Marsh* closed in 1979; this Court accordingly only had an opportunity to evaluate the full text of the pre-1980 prayers and those pre-1980 prayers were the subject of this Court's decision. See *infra* pp. 7-13.

prayer opportunity has [not] been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-795.

The record in *Marsh*, and the publicly available prayers that were printed in the Nebraska legislative journal, constitute a concrete demonstration that these prayers were often identifiably Christian—and that this Court therefore found such prayers to create no constitutional problem.

2. The holding in *Marsh* is correct and consistent with the case's record. This Court in *Marsh* found that the "unambiguous and unbroken history" of legislative prayer left "no doubt" that the practice was constitutional and "part of the fabric of our society." *Marsh*, 463 U.S. at 792-793. Even confronted with a record abounding in often "explicitly Christian" prayers, *id.* at 793 n.14, the Court emphasized that the content of legislative prayers—Christian, non-Christian, or otherwise—was not relevant to the practice's constitutionality, *id.* at 795. The *Marsh* Court thus found no need to import an endorsement analysis or any other Establishment Clause "test," such as that announced in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

The Second Circuit excused its departure from *Marsh*'s clear guidance because of a puzzling passage from a later case that had nothing to do with legislative prayer. In *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989), a brief dictum suggested that Rev. Palmer's prayers were constitutional because, in 1980, he accommodated a Jewish legislator by omitting the name of Jesus Christ in prayers. That assertion is contrary to the record of *Marsh*, which closed before 1980 and is full of identifiably Christian prayers. And it ignores *Marsh*'s holding, which put prayer content generally off-limits to judges—a holding that would be hard to explain if the result would have been different

but for Rev. Palmer's omission of Christ's name in prayers that were not even part of the record. If that *were* central to *Marsh*, one would at least have expected the Court to state that the prior sixteen years did *not* survive First Amendment scrutiny, and that future years would not survive it if Rev. Palmer or a successor were to again use Jesus' name in prayers.

The consequence of diluting the *Marsh* holding with the *Allegheny* dictum is evident from the Second Circuit's intrusive inquiry into the minutest details of specific prayers offered before the Town Council. Departing from *Marsh* converts federal courts into prayer patrols, despite *Marsh*'s admonition to the contrary. The *Allegheny* dictum is utterly inconsistent with *Marsh* itself. Thus, either the *Allegheny* dictum (and by extension, the judgment below) or *Marsh* itself must be wrong. More to the point, Rev. Palmer's prayer practice was in every measureable way *more* identifiably Christian than is the practice of the Town of Greece. *Marsh* and the judgment below cannot coexist; there is room in the legal universe for only one of them. Because *Marsh* was correctly decided, the judgment below is necessarily in error, and it should be reversed.

3. Departing from *Marsh* chills the exercise of a constitutionally protected right—the right of legislative assemblies across the Nation to begin their sessions with invocations. *Marsh* provided broad scope for such prayers, subject to a narrow exception preventing truly extreme situations. But affirming the judgment below would reverse that balance and turn ordinary practices into opportunities for full-scale litigation. As the Second Circuit was plainly aware, many towns give up in frustration when faced with so many obstacles. The court even hinted that prudent towns would abandon the plan to have legislative prayer. Pet. App. 27a. Such an assault on constitutional freedom is intolerable.

ARGUMENT

This Court affirmed the constitutionality of legislative prayer in *Marsh* and, fully aware of the religious and Christian nature of Rev. Palmer's prayers, expressly declined to subject the content of such prayers to judicial scrutiny. In recent years, however, some courts have revised this history. They have ascribed to Rev. Palmer's prayers an essentially non-religious character, and have interpreted *Marsh* as approving his prayers because of their purported blandness. The Second Circuit indulged this double error. This Court should reaffirm *Marsh*.

I. THIS COURT UPHELD REV. PALMER'S PRAYERS WITH FULL KNOWLEDGE OF THEIR IDENTIFIABLY CHRISTIAN NATURE

Marsh's record makes clear what this Court did and did not hold. It did hold that such prayers were constitutional even if their contents were faithful to the chaplain's religious views. It did not hold that federal judges could strike down prayer practices at will if individual prayers ever happened to be "too" religious.

A. Rev. Palmer's prayers in the *Marsh* record were identifiably Christian

In *Marsh*, Nebraska Senator Ernest Chambers, a legislator and taxpayer, argued that Nebraska's legislative prayer practice was unconstitutional because the chaplain's daily "prayers are in the Judeo-Christian tradition." *Marsh*, 463 U.S. at 793. Senator Chambers's complaint in federal district court emphasized that Rev. Palmer's prayers "have frequent references to the Christian religion," and that Rev. Palmer made "[n]o effort" to drain those prayers of such content. J.A. 2, *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (No. 82-234) (Complaint ¶ 8).

Senator Chambers was correct—Rev. Palmer's prayers were routinely identifiably Christian. The record in *Marsh* contained annual "prayer books," compiling Rev.

Palmer's prayers, ending in 1979. *See* 1979 Prayer Book, Exh. 3, *Marsh* Record.[4] These prayers—the prayers that Senator Chambers presented to the federal courts for decision—were identifiably Christian, routinely naming Christ and making other unmistakable references to Judeo-Christian theology. Accordingly, the Court could not have, and did not, put off for a future day the question of whether prayers that clearly come from a specific religious tradition are constitutional when part of a legislative-prayer practice.

Prayers in the *Marsh* record bear this out. For example, on January 13, 1975, Rev. Palmer prayed:

> *Our heavenly Father*, in this moment of prayer, when there is silence in this senate chamber, may there not be silence in Thy presence. May our prayers be heard.
>
> May no short circuits be made by our lack of faith, our high professions joined to low attainments, our fine words hiding shabby thoughts, or friendly faces masking cold hearts.
>
> Out of the same old needs, conscious of the same old faults, we pray on the same old terms for new mercies and new blessings. *In the name of Christ our Lord. Amen.*

1975 Prayer Book at 1, Exh. 1, *Marsh* Record (emphasis added). As this prayer shows, Rev. Palmer began and ended his prayers with an invocation of one member of the Holy Trinity. Each prayer also ended with "Amen," a well-known Judeo-Christian expression of communal assent to the prayer. These Christian elements were also present in his prayer of February 18, 1977:

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[4] Originally published in the Nebraska Legislative Journal, Rev. Palmer's prayers were periodically collected and republished as prayer books, which were later made exhibits in the *Marsh* record. *Marsh*, 463 U.S. at 785 n.1.

> *Our Father*, as we pray for Your guidance and help, we know that You did not intend prayer to be a substitute for work. We know that we are expected to do our part for You have made us, not puppets, but persons with minds to think and wills to do. Make us willing to think, and think hard, clearly, and honestly, guided by Your voice within us, and in accordance with the light You have given us. May we never fail to do the very best we can. We pray in the knowledge that it all depends upon You. Help us then to work as if it all depended on us, that together we may do that which is pleasing in Your sight. *For Jesus' sake. Amen.*

1977-78 Prayer Book at 2, Exh. 2, *Marsh* Record (emphasis added). Rev. Palmer's prayer of February 14, 1978 is another typical example of how he integrated Christian vocabulary into his prayers:

> *O God*, we consider our resources in money, men and land, yet forget the spiritual resources without which we dare not and cannot prosper. Forgive us for all our indifference to the means of grace thou hast appointed. *Thy Word*, the best seller of all books, remains among the great unread, the great unbelieved, the great ignored. Turn our thoughts again to that book which alone reveals what man is to believe concerning God and what duty God requires of man. Thus informed, thus directed, we shall understand the spiritual laws by which alone peace can be secured, learn what is the righteousness that alone exalteth a nation. For the sake of the world's peace and our own salvation, we pray *in the name of Christ*, thy revelation. *Amen.*

Id. at 18 (emphasis added).

Other prayers quoting the Bible are even more easily identifiably Christian. For instance, Rev. Palmer's pray-

er of May 10, 1979 reads:

> *O God*, who has given to all persons talents and varying capacities, Thou dost only require of us that we utilize Thy gifts to the maximum. In this Legislature to which Thou has entrusted special abilities and opportunities, may each recognize his stewardship for the people of the State. Through the perplexing problems and needed decisions give them calmness and wisdom. May heated debates always be on the issues and not develop into personal jealousies which only defeat the purpose of our representative government. May we at the beginning of a new morning say, *"This is the day that the Lord hath made, let us rejoice and be glad in it." Amen.*

1979 Prayer Book, Exh. 3, *Marsh* Record (emphasis added), at Nebraska Legislative Journal, 86th Leg., 1st Sess. 2149 (1979) (hereinafter 1979 Journal).[5] Likewise, in his prayer of January 3, 1979, Rev. Palmer quoted from the Bible as he asked for God to bestow grace upon the Nebraska legislators:

> *Eternal God*, Who makes all things new, as we begin another new Session together * * * .
>
> Give us what we need for the challenges which confront us, endurance for the trivia that clogs our calendars, and the wisdom to tell the difference between the two. Instruct each one of us, the officers of this body, each Senator, each secretary, each aide, each one involved in the enactment of legislation for the people of this State this year, that together we may "*do justly, love mercy, and walk humbly with our God*" and with one another so that, when this Session ends, we may be greeted by Your

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[5] The Nebraska Legislative Journal for 1979 is available online at http://www.nebraskalegislature.gov/FloorDocs/86/PDF/Journal/ at the "r1journal.pdf" hyperlink.

benediction, "*Well done, good and faithful servants.*" *Amen.*

1979 Prayer Book, 1979 Journal at 69-70 (emphasis added).

Because the topics of his prayers varied day by day, Rev. Palmer also incorporated Jewish and Christian holy days into his prayer cycles. For instance, one prayer offered near Easter, on April 12, 1977, invoked Christ's death and resurrection:

> *Father in Heaven*, we thank You this day for the gift of life. As spring returns to our countryside, we are reminded that the inevitable cycles of Nature are Your creation and no one is exempt.
>
> We thank you for the gift of *Your Son, whose Resurrection we are celebrating*, who is the reason for our hope and source of our joy. Help us now, rejuvenated by the recess, and inspired by *Your Son's* victory over death, to take up the business of the people and conduct it with justice, equality and love. *Amen.*

1977-78 Prayer Book at 6 (emphasis added). Two years later on April 9, 1979, Rev. Palmer's prayer reflected both Easter and Passover:

> Today as *we are about to celebrate the great Holy Days of Christians and Jews, Holy Week and Passover*, let us be reminded again through the faith and beliefs of our religions of the principles and directives which should guide us. May there be a continuing concern on your part as legislators for those who are in need, for those who are deprived of any of their rights in our State, and for the promotion of justice and prosperity for all. May these Holy Days, then, enable us to act as true followers of the beliefs which we have and may it find expression in every act and law that is passed. May this Holy Season be a happy season for us and for all people of

this State. *Amen.*

1979 Prayer Book, 1979 Journal at 1490 (emphasis added). And given that Rev. Palmer's prayers, offered in service of a governmental body, also fell in the broad tradition of the American civil religion, *Marsh*, 463 U.S. at 793 n.14, other of his prayers commemorated patriotic holidays, such as Abraham Lincoln's birthday on February 12, 1975:

> We are grateful for the lives of men and women who serve the needs of their times. The life of Abraham Lincoln speaks to us of the possibilities of our own lives. As we celebrate his birthday we would ask of Thee to help us to acquire his spirit of compassion, patience, and courage. Help us also to respond to the cries for help and guidance in our own times; this day is such a time; give us then a right spirit for the cries of this day. *We ask for this in the Name of Thy loving Son, Christ our Lord. Amen.*

1975 Prayer Book at 7 (emphasis added).

Rev. Palmer's prayers were recognizably Judeo-Christian beyond their references to Christ, the Bible, or holy days. Rev. Palmer's prayers drew deeply from the well of Judeo-Christian theology.[6] As Rev. Palmer's foreword to one prayer book said,

> * * * The prayers are a sincere effort of this part of the "people of God" to raise their minds and hearts in praise of the Father of us all. * * *
>
> Often, we have thanked God for the many blessings that He has bestowed on us. On occasion we have sought His forgiveness for our transgressions of His law. Almost daily we asked our Lord on be-

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[6] See also *infra* Part I.B, recounting Rev. Palmer's deposition testimony about the Judeo-Christian inspiration for his prayers.

> half of ourselves and our fellow citizens to alleviate sufferings, inspire righteous laws, motivate and guide us all in our pursuit of the Will of God.

1977-78 Prayer Book, Foreword. Indeed, without disparaging any other religion, some of Rev. Palmer's prayers were Judeo-Christian to the implicit exclusion of other faiths and non-faiths, as seen in his prayer of April 5, 1979, which quotes the Bible's exclusive language:

> Father in Heaven, we labor unceasingly to learn more about our job; to stay up with trends; to please our constituents, and to pass better laws in order to better people.
>
> * * * [L]et us recall the words of the Psalmist: "Unless the Lord build the house, they labor in vain who build it. Unless the Lord guard the city, in vain does the guard keep vigil. It is vain for you to rise early, or put off your rest, you that eat hard-earned bread, for He gives to His beloved in sleep." *Amen.*

1979 Prayer Book, 1979 Journal at 1442. Rev. Palmer continued to pray along these Christian lines until the final prayer in the record, May 23, 1979, a solemn blessing at the close of the legislative session:

> *Dear Lord*, an honest prayer some of us might make this morning is simply, "Thank God its over." These many weeks have been such a drain on so many of us, taking us away from responsibilities and loved ones elsewhere, and demanding so much of us.
>
> Lord, we are also grateful for these past months and for all the good that has been accomplished. May our decisions be for the benefit of the people of this State. Continue during the interim to give vision, courage, and integrity to each of the Senators. Bless them, their families and loved ones, till we meet again. Be with our Governor and Lieutenant Governor, the various officers and servants of this

Legislature.

* * * Implant again upon our minds the truth that greatness is found in serving, and success in helpfulness. *May this Legislature continue to love You, their God, and serve all the people. In our Lord's name. Amen.*

1979 Prayer Book, 1979 Journal at 2431 (emphasis added).

The predominantly Christian nature of Rev. Palmer's sixteen years of prayers did not go unnoticed by the Court. Indeed, Justice Stevens quoted one such prayer at length to show how identifiably Christian the prayers were. *Marsh*, 463 U.S. at 823-824 & n.2 (Stevens, J., dissenting) (quoting prayer of March 20, 1978).

B. Rev. Palmer's description of his prayers as "nonsectarian" has been taken out of context

The *Marsh* Court also adopted Rev. Palmer's description of his prayers as Christian yet nonsectarian.[7] Rev. Palmer, a defendant in the suit brought by Senator Chambers, provided deposition testimony about the legislative-prayer practice that he administered as chaplain for sixteen years. This Court quoted Rev. Palmer's deposition in a two-sentence footnote:

> Palmer characterizes his prayers as "nonsectarian," "Judeo Christian," and with "elements of the American civil religion." Although some of his earlier prayers were often explicitly Christian, Palmer removed all references to Christ after a 1980 complaint from a Jewish legislator.

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[7] As discussed in Part II.A, *infra*, the "sectarian" or "nonsectarian" label is not an appropriate basis for judicial review of a prayer practice under *Marsh*. But because it was the fulcrum of the Second Circuit's effective abrogation of *Marsh*, *amicus* provides this background to demonstrate that the Second Circuit's understanding of the word "sectarian" is deeply flawed.

Marsh, 463 U.S. at 793 n.14 (citations omitted).

At first glance, it is not self-evident what this description really means. As the record reveals, see *supra* Part I.A, the Court was quite correct to observe that Rev. Palmer's "prayers were often explicitly Christian." *Marsh*, 463 U.S. at 793 n.14. But Rev. Palmer's description of *those very prayers* as "nonsectarian" may seem at odds with their "explicitly Christian" content.

One mistaken resolution of the seeming puzzle is to assume that the Court's reference to Rev. Palmer's 1980 accommodation of a Jewish legislator made the prayers "nonsectarian." But that is wrong. After all, despite Rev. Palmer's continued service, the prayers that actually appear in the record ended with his 1979 prayers (and Senator Chambers's complaint was filed on December 12, 1979).[8] Nor is there any indication that Rev. Palmer's accommodation either was a matter of binding policy—something he or his successors were bound to maintain—or that omitting Christ's name would on its own be sufficient to render an otherwise "sectarian" Christian prayer automatically "nonsectarian." Nothing in the Court's opinion, or in any dissenting opinion, suggests that the absolute key to the decision was buried in the footnote and took the form of a bare mention of Rev. Palmer's 1980 practice—much less that the Court would rule on that post-litigation modification to the exclusion of *sixteen years* of Christian prayers actually challenged.[9]

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[8] Rev. Palmer deposed that, in 1980, after the start of the lawsuit, he began omitting Christ's name, not in response to the suit but at the request of "a personal friend, in confidence." Deposition of Def. Palmer at 11, Exh. 5, *Marsh* Record.

[9] See also *infra* Part II.B, addressing this inference in *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989).

The objectively correct resolution is, instead, drawn from Rev. Palmer's deposition, which was the source for footnote 14. The deposition makes crystal clear that the word "nonsectarian" is not a synonym for "devoid of identifiably Christian theology." Instead, Rev. Palmer called his prayers "non-sectarian" because they did not reflect the beliefs of one Christian "sect" or denomination over another—for instance, his own Presbyterianism. "*By sectarian I mean a prayer which promotes some particular denomination.*" Deposition of Def. Palmer at 6, Exh. 5, *Marsh* Record (emphasis added) (hereinafter "Deposition").

When pressed in his deposition to call a distinctly Christian prayer "sectarian," he declined:

> I wouldn't say sectarian, but I'd say Christian. * * * [A] sect is not a religion. To me it would be a gross injustice to millions of people around the world were I to say that Islam is a sect or the Jewish faith is a sect or the Christian faith is a sect. In no way is that a sect by any stretch of my imagination or by any jumble of semantics I can imagine. * * * *Nonsectarian is one that does not promote the furtherance of any specific group, cult or division of the Judeo-Christian faith.*

Deposition at 7-8 (emphasis added). Under this definition, any sub-groups of either Christianity or Judaism, such as Presbyterianism, Lutheranism, or Orthodox Judaism, could be called sects or denominations. Rev. Palmer's position was clear: despite his references to Christianity, his prayers were not sectarian, even if referencing Christ would make some prayers "Christian" as opposed to "Judeo-Christian."[10]

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[10] This is further illustrated when Rev. Palmer was asked whether his prayer of January 13, 1975, excerpted *supra* p. 7, reflected "the Judeo-Christian tradition" as opposed to a sect. Rev. Palmer replied

Nor was this an idiosyncratic definition. Throughout Rev. Palmer's chaplaincy, Black's Law Dictionary consistently defined "sect" as a group with particular religious doctrines "which distinguish them from others holding *the same general religious beliefs*," and "sectarian" as "[d]enominational" and "pertaining to, and promotive of, the interest *of a sect*," rather than the larger religion as a whole. Black's Law Dictionary 1520, 1521 (rev. 4th ed. 1968) (emphasis added); see also Black's Law Dictionary 1214 (5th ed. 1979) (identical text).

The representative prayer excerpts surveyed above bear out the truth of Rev. Palmer's explanation. None of Rev. Palmer's prayers is identifiably Presbyterian, or of any other denomination, to the exclusion of another Christian "sect." As he put it, "I've never given a sectarian prayer in the Legislature, ever, in 15 years." Deposition at 5.

Rev. Palmer was also asked to explain in what sense his prayers were "Judeo-Christian." He replied:

> I mean that heritage which reflects the story of humankind's search for the Almighty in the pages of the Bible that has been, in essence, the heritage which is the founding of America's heritage as a nation which calls itself a religious nation.

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that the entire prayer reflected "the Judeo-Christian tradition," "except for the last sentence," which referenced "the name of Christ Our Lord." Deposition at 7. He went on: "It's a Christian." *Ibid.* When asked if that "[n]arrows it down to a Christian prayer?" he responded, "*I wouldn't say sectarian, but I'd say Christian.*" *Ibid.* (emphasis added). This exchange, in full, makes clear that just because Rev. Palmer's prayers were openly Christian (as opposed to "Judeo-Christian"), they still were not sectarian. Rev. Palmer was consistent in his testimony that the Christian faith alone, as opposed to one denomination of Christianity, did not constitute a "sect."

Deposition at 20-21.[11] And Palmer acknowledged that "you will find Jesus' name throughout these prayers" but with "equal references to the Old Testament." *Id.* at 8, 12. Rev. Palmer's answers were entirely consistent. His prayers could be Christian, and clearly invoke the Judeo-Christian tradition, without being "sectarian." And the above examples of his prayers are just that.

This Court's opinion used the word "sectarian" or "nonsectarian" only once—in footnote 14, where it quoted Rev. Palmer as describing the prayers as "nonsectarian." *Marsh*, 463 U.S. at 793 n.14. Given that context, the Court's understanding of that term must be drawn from how Rev. Palmer used it in his deposition.

II. *Marsh* Controls And Was Correctly Decided

A. The religious content of legislative prayer is generally of no concern to courts

The holding in *Marsh* is correct and consistent with the case's record. If the Court had wished to hold that a legislative-prayer practice with prayers that are predominantly Christian (or of any identifiable faith) are unconstitutional, it had a ready-made record to establish that point.

But the Court rejected the challenge without recourse to any of the standard Establishment Clause "tests," including the test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). *Marsh* instead recited the "unambiguous and unbroken history" of legislative prayer and expressed "no doubt" that the practice was constitutional and "part of the fabric of our society." *Marsh*, 463 U.S.

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[11] In fact, Rev. Palmer stated that he aimed for his prayers to be "in the *mainstream* of the Judeo-Christian tradition"—a far cry from the extreme multiplicity of prayer-givers required by the Second Circuit. Deposition at 5 (emphasis added).

at 792-793.[12]

And against the backdrop of a record replete with often "explicitly Christian" prayers, *Marsh*, 463 U.S. at 793 n.14, the Court emphasized that the content of legislative prayers—Christian, non-Christian, or otherwise—was not relevant to the practice's constitutionality. It stated:

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Marsh, 463 U.S. at 794-795. Indeed, despite a 16-year-long chaplaincy of a single minister of a single denomination—Rev. Palmer and his branch of Presbyterianism—this Court rejected the argument "that choosing a clergyman of one denomination advances the beliefs of a particular church." *Id.* at 793.[13]

Petitioner is therefore correct that, under *Marsh*, it should not be dispositive whether a legislative prayer is or is not "sectarian." Pet. Br. 9, 26. Judicial scrutiny is limited to whether "the prayer opportunity has been ex-

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[12] This accords with Rev. Palmer's understanding of his prayers as part of the American historical tradition and civil religion. *Marsh*, 463 U.S. at 793 n.14. As he stated, "Why do I use quotations from the Psalms or Moses or Abraham? Because this country is a country that recognizes the Bible." Deposition at 10.

[13] The Nebraska Legislature had a long tradition of lengthy terms for individual chaplains. In fact, Rev. Palmer's predecessor died while in office. Deposition at 3. Rev. Palmer unsuccessfully sought to persuade many other, more diverse, clergy to take a regular share of the legislative prayers. Deposition at 48 (noting that other clergy had "genuine reluctance, particularly if I asked them for the second time. And in all frankness, most clergy persons do not live in Lincoln who represent these Senators.").

ploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-795.

It is entirely improper for courts to parse the meaning of prayers, making theological judgments about their level of religiosity, or to enable private litigants to grill prayer-givers in trials and depositions. Indeed, under *Lee* v. *Weisman*, 505 U.S. 577, 590 (1992), prayer content is immune from judicial scrutiny *because* of its religious nature—the opposite of the Second Circuit's approach. See Pet. Br. 41-42. And this is not a hypothetical concern. Rev. Palmer experienced such improper questioning during his deposition in the trial court in *Marsh*.

For this reason, the court below erred when it interpreted *Marsh* to require a full evaluation of "the totality of the circumstances" of each prayer practice—or even each individual prayer. See Pet. App. 17a. Such an approach casts aside *Marsh*'s concerns for the limits of proper judicial scrutiny. Although the court below purports not to intend to drive out *all* Christian or denominational prayers, it still makes the Town responsible for the content of every prayer-giver, leading to a case-by-case weighing of "how much Christianity is too much." See *Rubin v. City of Lancaster*, 710 F.3d 1087, 1095 (9th Cir. 2013) (noting that the Second and Fourth "circuits have undertaken something like an observer-based 'frequency' analysis, invalidating any legislative prayer practice that, from the vantage point of the prayers' listeners, has resulted in too large a proportion of sectarian invocations from one particular religious group.").

This is hardly "neutrality." Indeed, judicial policing of the content of legislative prayer would lead to nothing more than the coercive enforcement of a civil orthodoxy. Yet even the Second Circuit recognized that, "[u]nder the First Amendment, the government may not establish a vague theism as a state religion any more than it may establish a specific creed." Pet. App. 16a. An imposed civil

orthodoxy does not promote neutrality; rather, it excludes any speaker unwilling to discard his true beliefs to avoid crossing judge-drawn lines that demarcate appropriate from inappropriate religious content. Far from neutrality, this approach would amount to unmistakable hostility to religious belief that goes beyond whatever lukewarm standards that a court might invoke.

B. *Marsh*'s holding should trump the *Allegheny* dictum to the extent of any conflict

The source for the lower courts' undermining of *Marsh* lies in a brief dictum from this Court's opinion in *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). The dictum stated that the prayer practice in *Marsh* was acceptable "because the particular chaplain had 'removed all references to Christ.'" *Id.* at 603 (quoting *Marsh*, 463 U.S. at 793 n.14). It suggested that identifiably Christian prayers were not a "nonsectarian reference[] to religion" but instead impermissibly affiliated the government with Christianity. *Ibid.*

But that dictum—dictum in part because *Allegheny* involved public holiday displays, not legislative prayer—contradicted the holding in *Marsh* and, as detailed in Part I, *supra*, misrepresented the *Marsh* record.[14] Even the Second Circuit in this case acknowledged that *Allegheny* contradicted *Marsh*. See Pet. App. 17a; see also *Rubin*, 710 F.3d at 1092 ("Footnote 14 notwithstanding, *Marsh* nowhere confines its review of Nebraska's practice solely to the short period in which Palmer delivered only nonsectarian prayers."). Just because Rev. Palmer noted the change in 1980 does not mean that such prayers were within the scope of the Complaint, which

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[14] Nor was *Marsh* central to the holding in *Allegheny*. The Court mentioned *Marsh* only to respond to Justice Kennedy's separate opinion referencing *Marsh*.

specifically alleged that "[n]o effort is made by the defendant Palmer to make the prayers nonsectarian." J.A. 2, *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (No. 82-234) (Complaint ¶8). Nor does it change the fact that this Court reviewed and held constitutional the Nebraska Legislature's *decades-long* practice as reflected in the earlier prayers on record.

Yet the dictum has caused some courts to characterize any Christian prayer as impermissibly "sectarian," leading them to strike down any prayer practice in which Christian prayer predominates. The most extreme example may be *Joyner* v. *Forsyth County*, 653 F.3d 341, 348, 353, 355 (4th Cir. 2011), which struck down a predominantly Christian legislative-prayer practice and instructed governments to be "proactive in discouraging sectarian prayer in public settings." And, of course, the judgment below states that a prayer practice that is sectarian may be invalid if, in the view of any given federal court, the "totality" of the practice could convey to a reasonable observer that "the town favored or disfavored certain religious beliefs." Pet. App. 17a. These courts seek to use a very broad definition of "nonsectarian," paired with an endorsement-style approach imported from the *Allegheny* and *Lemon* line of cases, to censor any prayer that can be identified as Christian or of any other religion. And the inevitable resulting confusion has already spread from the context of legislative prayer to a wide variety of practices involving prayerful participation in public life.[15]

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[15] The difficulty in reconciling *Marsh* and *Allegheny* arises in contexts separate from prayer before legislative sittings. *E.g.*, *Newdow* v. *Rio Linda Union School Dist.*, 597 F.3d 1007, 1035-1038 (9th Cir. 2010) (rejecting challenge to "under God" in the Pledge of Allegiance); *Newdow* v. *Roberts*, 603 F.3d 1002, 1017-1021 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (rejecting challenge to the presidential inaugural ceremony and oath's "So help me God" phrase); *Mellen* v.

Lower courts adopting some blend of this sectarian-versus-nonsectarian or endorsement-style approach have brushed aside *Marsh*'s warnings about the constitutional inappropriateness of such judicial scrutiny of prayers. But, the Ninth Circuit rightly realized, "the very act of deciding—as a matter of constitutional law, no less—who counts as a 'religious figure' or what amounts to a 'sectarian reference' not only embroils judges in precisely those intrareligious controversies that the Constitution requires us to avoid, but also imposes on us a task that we are incompetent to perform." *Rubin*, 710 F.3d at 1100. In fact, the Ninth Circuit could "'hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.'" *Ibid* (quoting *Lee*, 505 U.S. at 616-617 (1992) (Souter, J., concurring)). This did not deter the Second Circuit panel below from delving into the text and terminology of various volunteers' prayers—but it should have.

C. The judgment below departs from *Marsh*'s holding—and would require a different outcome in *Marsh* itself

The judgment below demonstrates that the *Marsh/Allegheny* split has real consequences. Despite paying lip service to the idea of moving beyond a sectarian-

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Bunting, 327 F.3d 355, 369-370 (4th Cir. 2003) (striking down Virginia Military Institute's supper prayer); *N.C. Civil Liberties Union Legal Found.* v. *Constangy*, 947 F.2d 1145, 1147-1149 (4th Cir. 1991) (holding unconstitutional a state judge's practice of opening court with prayer); *Freedom from Religion Found., Inc.* v. *Obama*, 705 F. Supp. 2d 1039, 1059-1063 (W.D. Wis. 2010), *vacated on other grounds by* 641 F.3d 803 (7th Cir. 2011) (holding that the National Day of Prayer violates the Establishment Clause); *Freedom from Religion Found., Inc.* v. *Hickenlooper*, No. 10CA2559, 2012 WL 1638718, at *14, *25-26 (Colo. Ct. App. May 10, 2012) (invalidating a governor's day-of-prayer proclamation).

versus-nonsectarian analysis of legislative prayer, and reciting that "the touchstone of our analysis must be *Marsh*," which "did not employ the three-pronged test the Court had adopted, eleven years earlier, in *Lemon*," Pet. App. 10a, 16a, the Second Circuit's conclusion rested on the supposedly "sectarian" nature of the prayers offered in the Town of Greece. Pet. App. 14a-17a, 20a-22a. And the court nevertheless imported into legislative prayer cases many concepts from *Lemon* that are foreign to *Marsh*—and consciously so, given that Chief Justice Burger was the author of *both* of those cases.[16] At its core, the judgment below held that the Establishment Clause was violated by "the impression, created by the steady drumbeat of often specifically sectarian Christian prayers, that the town's prayer practice associated the town with the Christian religion." Pet. App. 22a.

But there is no legal universe in which the judgment below and *Marsh* can both have been correctly decided. If the prayer practice invalidated by the Second Circuit is unconstitutional, there is no way that the Nebraska practice approved in *Marsh* could survive. *Marsh* involved a single, paid chaplain—an ordained clergyman—for 16 years, see 463 U.S. at 784-785, compared to a constantly rotating cast of unpaid volunteers from many backgrounds here, see Pet. App. 4a-6a. And the ostensibly "sectarian" prayers quoted by the Second Circuit, see Pet. App. 7a, are no more "explicitly Christian" than prayers in the *Marsh* record, see *supra* Part I.A.

In fact, on every conceivably relevant metric, Rev. Palmer's prayer practice in *Marsh* was more "problematic" than the Town of Greece's practice here:

- **Number of prayer-givers.** The Nebraska Legis-

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[16] Chief Justice Burger was the author of both *Lemon* and *Marsh*. The Court's refusal to employ *Lemon*'s methodology in resolving *Marsh* was hardly an oversight.

lature hired Rev. Palmer as its regular chaplain, 463 U.S. at 784, 793, but the Town relies on a constantly rotating cast of volunteers, Pet. App. 6a.

- **Official status of prayer-givers.** The Nebraska Legislature appointed Rev. Palmer as an officer of the legislature,[17] and its official chaplain, 463 U.S. at 785, but there is no official position for anyone who prays before a Town Council meeting, Pet. App. 4a.
- **Payment for prayers.** The Nebraska Legislature not only gave Rev. Palmer an official status, but also a taxpayer-funded salary, 463 U.S. at 784-785, but all prayer-givers in the Town are *unpaid* volunteers, Pet. App. 4a, 8a.
- **Tenure of prayer-givers.** Rev. Palmer began his tenure sixteen years before litigation began, 463 U.S. at 784-785, but the Town invites new prayer-givers for each meeting, with any reinvitation being solely a matter of rotation, Pet. App. 4a.
- **Selection method.** The Nebraska Legislature directly and specifically hired Rev. Palmer, a Presbyterian minister, 463 U.S. at 784, 793, but the Town makes random cold calls (based on a business directory and newspaper) and accommodates community members' requests and volunteers, Pet. App. 5a, 31a.
- **Proportion of Christian prayers.** All prayers before the Nebraska Legislature were Judeo-Christian, 463 U.S. at 793, but only 66% of the Town's prayers have been identifiably Christian,

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[17] See Nebraska Legislative Journal, 75th Leg. 11 (Jan. 5, 1965) (Dr. Robert Palmer "elect[ed]" as "Chaplain," one of the "officers of the Legislature"). That volume is available online at http://www.nebraskalegislature.gov/FloorDocs/75/PDF/Journal/ at hyperlink "r1journal.pdf."

Pet. App. 7a.

- **Christian prayer content.** Rev. Palmer made "frequent references to the Christian religion," with "[n]o effort" to drain those prayers of such content, J.A. 2, *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (No. 82-234) (Complaint ¶8), but the Town's prayer-givers opened meetings with a variety of prayers, including non-Christian prayers, Pet. App. 4a-5a, 7a, 125a.

Given this comparison, petitioner aptly observed that if Rev. Palmer's chaplaincy was constitutional, then the Town's practice must *a fortiori* be constitutional. Pet. Br. 21. If there was a "steady drumbeat of often specifically sectarian Christian Prayers" in the Town of Greece, Pet. App. 20a-23a, the staccato was even more pronounced in Nebraska. Yet *Marsh* adopted Rev. Palmer's description of his prayers as "nonsectarian," and had "no doubt" that the Nebraska Legislature's practice was constitutional—indeed, even "part of the fabric of our society," 463 U.S. at 792-793. However much that description applied to the Nebraska practice, it must, as a matter of law, apply *even more* to the Town's.

While the Town's many accommodations make it readily apparent that respondents' challenge was meritless, the Town did not *have* to go beyond the practice in *Marsh* to comply with the First Amendment. It had no *obligation* to provide virtually anyone with the opportunity to open Town Council meetings with prayer. That is, the Town could have simply named any local clergyman as the "chaplain," and could even offer a salary, and easily comply with *Marsh*. In approving the Town's practice, the Court should reaffirm *Marsh*, and thereby provide constitutional security for *all* prayer practices, so long as they meet the one bar that *Marsh* imposes—that "the prayer opportunity has [not] been exploited to proselytize or advance any one, or to disparage any

other, faith or belief." 463 U.S. at 794-795. Accord Pet. Br. 5 (noting the wide diversity of practices).

The *similarity* between the two practices on this front is what matters. Neither governmental body—the State of Nebraska or the Town of Greece—regulated the content of prayers, see *Marsh*, 463 U.S. at 793 n.14; Pet. App. 4a, 8a, 29a-30a, and neither acted with the "impermissible motive" that *Marsh* proscribes, see *Marsh*, 463 U.S. at 793, 794-795; Pet. App. 10a, 21a. Indeed, the best way to ensure that a legislative prayer practice does not cross that line is to avoid governmental involvement in the text of the prayers, instead leaving that choice to whoever gives the prayer.

Marsh and the judgment below are irreconcilable. Either this Court must reverse the Second Circuit, or—by affirming—it will allow the Second Circuit to reverse *Marsh*.

III. THE JUDGMENT BELOW WILL UNJUSTIFIABLY CHILL CONSTITUTIONALLY PROTECTED LEGISLATIVE PRAYER

Legislative bodies across the United States should retain the constitutional right recognized in *Marsh* as "part of the fabric of our society"—the right to "open[] legislative sessions with prayer." 463 U.S. at 492. Decisions like the Second Circuit's here, or the Fourth Circuit's in *Joyner*, cause this right to atrophy. Assemblies have already started to avoid opening sessions with invocations—*not* after freely choosing that path, but because of the ever-present threat of lawsuits induced by jurisprudence derived from *Allegheny*. See Pet. Br. 45-47. As Judge Kelly has observed in a similar context, *Allegheny*'s handiwork means that "governments face a Hobson's choice: foregoing [legislative prayer] or facing litigation. The choice most cash-strapped governments would choose is obvious, and it amounts to a heckler's veto." *Am. Atheists, Inc.* v. *Davenport*, 637 F.3d 1095,

1106 (10th Cir. 2010) (Kelly, J., dissenting from denial of rehearing *en banc*).

The Second Circuit shows solicitude for hecklers, but is a demanding and unpredictable taskmaster for towns. *Marsh* accounted for the possibility that a legislative-prayer practice could cross the line and become little more than a tool for proselytizing of a particular sect. 463 U.S. at 794-795. But *Marsh* wisely emphasized that only such extreme circumstances warranted judicial scrutiny of legislative prayers. *Ibid.* Yet, where *Marsh* established a clear rule, the court below requires a full fact-intensive judicial inquiry whenever a complaint is filed, turning long-standing legislative-prayer practices into constitutional imbroglios. And after describing how hard it will be to design or defend a constitutionally-compliant legislative prayer practice, the court below ominously warns that "[t]hese difficulties may well prompt municipalities to pause and think carefully before adopting legislative prayer." Pet. App. 27a.

The court below is right about that, at least. A reasonable town attorney in New York, Connecticut, or Vermont, seeking to avoid costly litigation over legislative prayer, is indeed left with a series of questions which yield no satisfactory answer other than "wait and see." How far away must a town look for sufficiently diverse prayer-givers? Petitioner's rational response of using a directory of any religious entity within the town was neutral, but the Second Circuit somehow found that to be an element of "endorsement." Pet. App. 19a-20a. How can a town choose whom to call, and in what order should it call them? Random lotteries and working through business directories are out, the court below says. *Ibid.*; see *id.* at 24a-25a & n.9. Should a town then call no one, instead allowing the winds of chance to blow chaplains to the podium? What if, as here, adherents of Christianity, or some other religion, most often volunteer?

Each of the questions listed above, and dozens more like them, suggests that the litigation bonanza and intimidation campaign would only increase if this Court adopts the judgment below—unless cities accept the Second Circuit's hint and simply abandon any prayer practice to avoid that litigation. Instead, the Court should reverse, and reaffirm that legislative prayer is "deeply embedded in the history and tradition of this country" and is "not something to be lightly cast aside." *Marsh*, 463 U.S. at 790, 786 (quotation omitted).

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

TOWN OF GREECE,

Petitioners,

v.

SUSAN GALLOWAY AND LINDA STEVENS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF POLITICAL SCIENTISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

Amici are a group of distinguished political and social science professors who have studied and published on the unique qualities of local government, intergroup dynamics, and democratic governance. Their research, knowledge, and experience show that local public meetings are fundamentally different from federal or state legislative sessions. As a result of these differences, *amici* explain, state-sponsored prayer is more coercive at the local level than at the state or federal level, and any attempt to analogize between them is misguided.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Petitioners' blanket letter of consent to the filing of amicus briefs has been filed with the Clerk's office. Respondents' consent to the filing of this brief is being filed with the Clerk's office together with the brief.

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SUMMARY OF ARGUMENT

1. Petitioner and its *amici* argue that the prayer sponsored by the Town of Greece prior to town meetings is non-coercive because it is legislative prayer, which this Court found permissible in *Marsh v. Chambers*, 463 U.S. 783 (1983). They thus assume that the impact of official prayer is the same at different governmental levels. Social science research demonstrates, however, that there are fundamental differences between local public meetings and national or state legislative sessions that preclude any simple analogy between them. These differences make prayer before local public meetings more similar to the prayer that this Court found impermissible in *Lee v. Weisman*, 505 U.S. 577, 587 (1992), and *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 312 (2000), than the prayer this Court found permissible in *Marsh*.

2. In national and state legislative sessions such as those considered in *Marsh*, citizens have no role. While citizens may sometimes attend, they may not participate. And when they attend, they are

generally seated in the gallery, removed from the legislators and prayer givers. The size of the legislatures and populations they serve also distances the prayer from the citizens in attendance.

3. Unlike state or national legislative sessions, local public meetings are participatory events through which individual citizens directly seek benefits and voice opinions on matters of critical importance to them. Such meetings also serve an educative function, and have long been considered to be the primary schools of liberty. 1 Alexis de Tocqueville, *Democracy in America* 61 (P. Bradley ed., 1945.) Moreover, these meetings typically take place in intimate settings: Attendees are seated close together, and they are often personally acquainted with each other as well as the local officials whom they are trying to persuade. In such settings, the prayer giver is likely to treat citizens as worshippers rather than audience members, as exemplified in the Town of Greece. By directing prayer to citizens and asking them to participate, the prayer giver effectively immerses the citizens in the prayer.

4. The differences between local public meetings and national or state legislative sessions matter with respect to whether prayer is coercive. Participation in local public meetings is critically important to individual citizens, as it is often a required step in obtaining certain benefits such as zoning variances. Moreover, students often attend town meetings, sometimes even for school credit, as they do in the Town of Greece. Localities that include

prayer in such meetings thus effectively compel attendance at religious worship.

5. Including prayer in town meetings effectively compels not only attendance at religious worship, but also *participation* in that worship. Because the setting of public meetings generally places the public close to and facing local officials, an individual seeking to persuade local officials of a policy position is subjected to substantial pressure to join in the prayer to avoid any risk of overt or subconscious retaliatory decisions by the local officials. In the intimate setting of local public meetings, an individual faces additional pressure not to separate himself from the other members of his community in attendance because they include his neighbors, friends, and business associates. Social science research demonstrates the significance of these pressures related to issues with strong normative content, including religion.

6. Social science research also shows that many attendees at town meetings are likely to accede to those pressures and participate in the prayer by standing or remaining silent. Research on the dynamics of town meetings, as well as broader social science research, shows a significant tendency for individuals in such face-to-face settings to conform to the actions of a clear majority of their peers, and to comply with directions from authorities, even when they initially disagree.

7. A citizen should not have to give up his critical right to participate in public meetings in order to preserve his right to choose who will

minister to his spiritual needs by leading him in prayer.

ARGUMENT

In *Marsh v. Chambers*, this Court held that prayers delivered at the beginning of a state legislative session did not violate the Establishment Clause. 463 U.S. at 795. It focused on a practice of prayer before legislative sessions in the First Congress, which showed that "the First Amendment draftsmen . . . saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged." *Id.* at 791; *see also id.* at 787. The similarity of state legislative prayer to prayer in the First Congress was thus critical. The Court further noted that the practice at issue presented no greater constitutional concern than practices such as tax exemptions for religious organizations that the Court had previously approved. *Id.* at 791; *see also Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 662-63 (1989) (Kennedy, J., concurring).

Here, the social science literature shows that the converse is true. The unique features of local public meetings make prayer in such meetings meaningfully different than prayer before national or state legislatures, and at least as coercive as prayer at high school graduations and high school football games, which this Court has proscribed. *See Lee*, 505 U.S. at 597-98; *Santa Fe*, 530 U.S. at 312.

I. The State And Federal Legislative Sessions That Were The Settings Of The Prayer Approved In *Marsh* Provide Little Role For The Public.

In *Marsh*, this Court based its analysis of prayer before state legislatures on the practice of the First Congress. It was able to do so because of the similar features shared by state and federal legislatures. These very features, however, limit the potential coercive impact of state-sponsored prayer in federal and state legislative settings.

In the legislative sessions of both Congress and states, the citizenry at large has virtually no role. A citizen can attend a legislative session only as a passive observer—removed from the floor and relegated to the public gallery—watching his representatives act on his behalf. This isolation is by design: both the U.S. House of Representatives and the U.S. Senate explicitly prohibit citizen comment during legislative sessions. *See* H.R. Rule IV(2)(a), 113th Cong. (2013), *available at* http://clerk.house.gov/legislative/houserules.pdf; S. Rule XXIII, 113th Cong. (2013), *available at* http://www.rules.senate.gov/public/index.cfm?p=RuleXXIII. In similar fashion, no state explicitly allows for periods of public comment by citizens during a regular legislative session. Debate in Congress and state legislatures thus consists of legislators speaking directly to the other legislators assembled in the chamber.

The public is generally not even permitted on the floor during legislative sessions. In Congress, only

legislators, their staff, and an enumerated list of officials are allowed onto the floor of either legislative chamber. *See* H.R. Rule IV(2)(a); S. Rule XXIII. The situation at the state level is largely the same. Many states prohibit citizens from the floor of legislative chambers altogether. *See, e.g.*, Ala. Rule Sen. Proc. 4; Fla. Rule Sen. Proc. 10.1; N.H. Rule H.R. Proc. 17; N.C. Rule H.R. Proc. 12(g); Tex. Rule H.R. Proc. 5 §11; Tex. Rule Sen. Proc. 2.02; Wash. Rule H.R. Proc. 7(B). Even when these legislative sessions are required to be "open," this means only that an audience may observe the proceedings from the public gallery—often physically separated from the floor of the legislature. *See* National Conference of State Legislatures, *Open Meetings and Notice Requirements, in Inside the Legislative Process* 6-65, 6-65 (2002), *available at* http://www.ncsl.org/documents/legismgt/ILP/02Tab6Pt4.pdf; Indiana Amicus Br. 14 ("[N]o one—other than (perhaps) an elected legislator—has a right to speak on the floor of an elected legislative body."). This fact was highlighted in *Marsh*, in which Frank Lewis, Chairman of the Executive Board of the Nebraska Legislature, explained that the legislative chamber was not open to the public (only galleries were), and that the prayers were not shown on the televised portion of the proceedings. Joint Appendix at 27, *Marsh v. Chambers*, 463 U.S. at 783 (1983), *available at* http://voicesofamericanlaw.org/media/documents/Jointappendix.pdf.

Even in states that permit visitors on the floor during legislative sessions, the role of individual citizens is explicitly limited. To be permitted on the

floor, an individual has to be an invited guest of a representative or senator, and generally cannot address the legislative body at all. *See, e.g.*, Conn. Rule H.R. Proc. 10.1B.1; N.J. Rule Assemb. Proc. 7:2; Va. Rule H.R. Proc. 83; Cal. Rule Sen. Proc. 55(b); Kan. Rule Sen. Proc. 57; Wis. Rule Sen. Proc. 11. Moreover, in stark contrast to local public meetings, where individual citizens are expected to speak about issues that personally affect their lives, most states mandate that invited guests *have no interest* in the matter of discussion before the legislative body. Nebraska, for instance, prohibits invited guests "seated within the chamber" of its unicameral legislature from having "a direct interest in the matter being discussed." Neb. Rule Leg. Proc. 2 §3(c); *accord, e.g.*, N.Y. Rule Assemb. Proc. I, § 3, ¶ d ("No person shall be admitted to the floor of the Assembly Chamber who is interested in pending or contemplated legislation . . . ."); N.Y. Rule Sen. Proc. XI, § 2, ¶ h (same); Va. Rule H.R. Proc. 83 (stating that the privilege of visiting the floor of the Virginia House "shall not be exercised by any person having business for compensation before the House or any committee thereof"); *see also* S. Rule XXIII (denying lobbyists or other interested parties from entering the Senate floor when Congress is in session).

For all of these reasons, any coercive effect of state-sponsored prayer at federal or state legislative sessions is limited. Because the public cannot comment during such sessions, there is no need for any citizen to attend in order to advance his views. And given the physical distance between the seated public and the legislators, any citizen who does

attend can refrain from participation in prayer without standing out to any legislators he seeks to influence. This distance, along with the sheer size of most federal and state legislative bodies, further removes citizens from the prayer itself. Both the legislative sessions generally, and the prayers themselves, are held specifically for the elected officials. Thus, the minister in *Marsh*, Reverend Palmer, testified that his prayers were directed at Senators and their staff, not to the public at large: "I would say that I strive to relate the Senators and their helpers to the divine." Palmer Dep., *Marsh v. Chambers* Joint Appendix, *supra*, at 27. "My purpose is to provide an opportunity for Senators to be drawn closer to their understanding of God as they understand God." *Id.* at 46.

II. Local Public Meetings, Unlike State Or National Legislative Sessions, Are Participatory Events Held In Intimate Settings Among Members Of The Same Community.

Prayer before a public session of a local government, such as that at issue here, is very different from the practice approved in *Marsh* because of the context in which it occurs. Whether citizens live in a metropolitan area or a rural town, a "striking difference" between American governance at the local level and that at the federal and state levels is the "more participatory nature of local politics." Jeffrey M. Berry, *Urban Interest Groups, in The Oxford Handbook of American Political Parties and Interest Groups* 502, 509 (L. Sandy Maisel &

Jeffrey M. Berry eds., 2010) [hereinafter Berry, *Urban Interest Groups*]. Because local governments focus on particularized issues that impact citizens' daily lives, they are structured to acquire experiential evidence from citizens through public, participatory meetings, making it critical that many citizens attend and participate. Local public meetings thus bring cognizable communities together in intimate settings to focus on issues of local concern. As de Tocqueville explained, nowhere do citizens "exercise their power more immediately" than in the township. de Tocqueville, *supra*, at 62.

A. Local Governments Address Discrete Issues Of Central Importance To The Lives Of Individual Citizens.

Decisions at the local level generally deal with discrete matters that much more immediately impact the daily lives of citizens than those addressed at the state or federal level. Local governments carry out "many of the functions from education to police protection to road repair, that directly affect [citizens'] quality of life." Jeffrey M. Berry, Kent E. Portney & Ken Thomson, *The Rebirth of Urban Democracy* 236 (1993) [hereinafter Berry et al., *Urban Democracy*]. They resolve issues concerning land use, zoning, crime prevention, local budgets, garbage collection, waste disposal, school governance, the upkeep of local parks and recreational areas, and other matters that directly impact local residents. *See, e.g.*, Jane J. Mansbridge, *Beyond Adversary Democracy* 44-45 (1980). These are the issues that dominate local-government

meetings and that generate the most citizen participation at those meetings. *See* William H. Baker et al., *Critical Factors for Enhancing Municipal Public Hearings*, 65 Pub. Admin. Rev. 490, 493 (2005); William Barnes & Bonnie Mann, National League of Cities, *Making Local Democracy Work: Municipal Officials' Views About Public Engagement* 7 (2010); Brian E. Adams, *Citizen Lobbyists: Local Efforts to Influence Public Policy* 46-53 (2007).

B. The Ability To Participate In Local Government Meetings Is Critical To Citizens.

1. Local Government Meetings Are Participatory.

Because local government focuses on issues immediately relevant to citizens' day-to-day lives, it inherently depends on the experiences and information that the public brings to meetings. As Professor Jeffrey M. Berry explained in a study of local interest groups, "[o]ne great difference in the policy arguments" at the local and national level "is that in local politics the 'data' are often experiential." Berry, *Urban Interest Groups*, *supra*, at 505.

To gain this experiential information from the community, virtually all local governments utilize public meetings. Baker et al., *supra*, at 490 (public meetings are the "most common form of citizen input."); Brian E. Adams, *Public Meetings and the Democratic Process*, 64 Pub. Admin. Rev. 43, 44-45 (2004) [hereinafter Adams, *Public Meetings*] (stating that 97% of cities hold public hearings to seek citizen comment about local issues); *see also* Barnes &

Mann, *supra*, at 7 (indicating that local officials view citizen participation as very important to a successful public meeting).

The public participation phase of such meetings generally constitutes a substantial portion of the agenda. Judith E. Innes & David E. Booher, *Reframing Public Participation: Strategies for the 21st Century*, 5 Plan. Theory & Prac. 419, 424 (2004). Typically, a public comment period provides citizens with an opportunity—often at least two to three minutes per speaker—to share their thoughts with elected officials and other members of their community about any issues under consideration. *Id.*

The public comment period not only provides local governments with experiential data, but also adds transparency to the decision-making process, helps officials identify emerging problems, engenders new ideas, and generates buy-in from the public on tough decisions. These benefits are recognized not just in academic literature, but in guides written for local officials. *See, e.g.*, Carolyn J. Lukensmeyer & Lars Hasselblad Torres, IBM Center for Business Government Collaboration Series, *Public Deliberation: A Manager's Guide to Citizen Engagement*, at 9-10 (2006), Barnes & Mann, *supra*, at 11-16; Tina Nabatchi, IBM Center for Business Government Fostering Transparency and Democracy Series, *A Manager's Guide to Evaluating Citizen Participation*, at 37 (2012).

States recognize that public involvement is more important to local governments than to state governments because of the immediate impact that

local government has on citizens' lives. Most states thus explicitly *mandate* that for certain issues, localities provide an opportunity for public comment before taking government action. Adams, *Public Meetings*, *supra*, at 44. New York state law, for example, requires that Greece's five-member Town Board hold a public hearing before enacting *any* local law or ordinance. *See* N.Y. Mun. Home Rule § 20(5) (Consol. 2013); N.Y. Town Rule § 130 (Consol. 2013). Other states have similar laws. *See, e.g.*, La. Rev. Stat. Ann. § 42:14 (providing that all public bodies "shall allow a public comment period at any point in the meeting prior to action on an agenda item upon which a vote is to be taken"); Haw. Rev. Stat. § 92-3 (requiring that "[e]very meeting of all boards shall be open to the public" and that all interested persons attending such meetings shall be afforded "an opportunity to present oral testimony on any agenda item"); Vt. Stat. Ann. Tit. 1, § 312(h); N.J. Stat. Ann. § 10:4-12(a).

2. Participation In Local Government Matters.

Because decisions of local governments depend on information provided at public meetings regarding the experiences of individual citizens, it is often crucial for individuals concerned about an issue to attend and participate in such meetings.

In some localities, a public meeting is the *only* opportunity to obtain certain services from the local government. For example, in the Town of Greece, citizens *must* attend a Town Board meeting to obtain certain special-use permits and zoning variances. 2d

Cir. App. at A788. Given that variances can be decisive factors in major life decisions, such as opening a business or creating room for an additional child, participation at public meetings is effectively mandatory for many individuals. *See* Baker et al., *supra*, at 493 n.4 (stating that local boards largely consider issues that "substantively affect individuals' ability to use and enjoy their property").

Even when citizens are not seeking discrete legal benefits, public meetings remain a powerful "tool that [citizens] can use to achieve political objectives." Adams, *Public Meetings*, *supra*, at 43. As one set of researchers described, at the local level, "fights are often over what is going to happen to a particular place and these experiential facts are forcefully articulated by those who live or work in that particular place." Berry, *Urban Interest Groups*, *supra*, at 505. Thus, "[t]he arguments that advocates make are frequently stated in the form of 'this is what will happen to my home,' 'my neighborhood,' [or] 'my business . . . .'" *Id.* This is understandable; issues such as zoning, land development, and budgeting directly affect many individuals' ability to use and enjoy their property, and citizens speak at meetings to defend their interests. Baker et al., *supra*, at 493.

Public meetings also serve as a forum for citizens to "express opinions that run counter to" the views expressed by officials, thereby creating a level of direct accountability unheard of in state legislatures or Congress. Adams, *Public Meetings*, *supra*, at 49.

In addition to the persuasiveness of information provided in public comments, the number of people commenting can have a real impact on local policy. Because there is often no polling data on local issues, public meetings provide critical information on public support. Moreover, as one researcher described, "[i]f the preponderance of public comments is on one side or another of an issue, this may sway the board members, despite their recognition that it may not represent a cross-section of the community, because they see that the group is capable of organizing and pressuring decision makers." Innes & Booher, *supra*, at 424.

Even if attendees do not themselves provide public comments, their attendance alone can be "critical" to showing elected officials that members of the community "care about an issue." Adams, *Public Meetings*, *supra*, at 46. This is because "there is [a] power in numbers, and turning out the masses at city council or school board meetings provides a political advantage by adding force to their message." *Id.*; *see also* Elaine B. Sharp, *Citizen Participation at the Local Level*, *in The State of Citizen Participation in America* 101, 107 (Hindy Lauer Schachter & Kaifeng Yang eds., 2012).

The conclusion that participation in public meetings is often crucial is consistent with more general political science research showing that the outcome of political conflict is often determined by the extent to which citizen groups with particular views become involved. E. E. Schattschneider, *The Semisovereign People: A Realist's View of Democracy*

in America 29-41 (1960); *see also* Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* 137-43 (2012) (explaining that American policymakers are more responsive to the economically advantaged because they participate more); Judy B. Rosener, *Making Bureaucrats Responsive: A Study of the Impact of Citizen Participation and Staff Recommendations on Regulatory Decision Making*, 42 Pub. Admin. Rev. 339, 342-45 (1982) (finding that citizen participation affected the voting behaviors of commissioners granting development permits).

3. The Level Of Citizen Participation Evidences The Importance Of Such Participation To Citizens.

The value of public meetings to individual citizens is highlighted by the fact that 42% of all United States citizens report attending at least one local public meeting over the course of a lifetime. *See* Sharp, *supra*, at 107 (citing Robert Putnam's landmark Social Capital Benchmark Survey). Moreover, according to 2008 U.S. Census data, 13% of citizens had attended a public meeting in which politics were discussed in the previous year.[2]

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[2] U.S. Census Bureau, U.S. Dep't of Commerce & Bureau of Labor Statistics, U.S. Dep't of Labor, Current *Population Survey, November 2008: Civic Engagement Supplement* at 237 (Inter-University Consortium for Pol. and Social Res. 2011), *available at* http://doi.org/10.3886/ICPSR29644.v1. Other studies also show that significant numbers of people nationwide regularly attend public meetings. *See, e.g.*, Frank M. Bryan,

The percentages are higher in smaller communities. J. Eric Oliver, *City Size and Civic Involvement in Metropolitan America*, 94 Am. Pol. Sci. Rev. 361, 364 (2000); *see also id.* at 370-71; Frank M. Bryan, *Real Democracy: The New England Town Meeting and How it Works* 86 (2004). It is thus apparent that local public meetings are especially important to small and rural communities, which are likely to be the most removed from the state and national legislative processes.

Not surprisingly, the individuals most likely to attend a public meeting are those with the greatest concern about a topic on the agenda. Katherine A. McComas, John C. Besley & Craig W. Trumbo, *Why Citizens Do and Do Not Attend Public Meetings About Local Cancer Cluster Investigations*, 34 Pol. Stud. J. 671, 675 (2006). People often go to local public meetings because of things happening very near to their homes such as concerns over local waste management or public health. *Id.* at 690-91; Thomas A. Heberlein, *Some Observations on Alternative Mechanisms for Public Involvement: The Hearing, Public Opinion Poll, the Workshop and the Quasi-Experiment*, 16 Nat. Resources J. 197, 201 (1976). Even "the marginally active," or those who are "not regularly active" in local meetings often participate when "they are stimulated by an issue that deeply

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Real Democracy: The New England Town Meeting and How It Works 57 (2004) (average of 20.5% of Vermont residents attend local public meetings); Berry et al., *Urban Democracy*, *supra*, at 293 (on average, 16% of city residents across five U.S. cities attended local neighborhood association meetings).

concerns them." Berry et al., *Urban Democracy*, *supra*, at 200-01. Public meetings are thus "typically attended primarily, if not uniquely, by avid proponents and opponents of a measure affecting them personally . . . ." Innes & Booher, *supra*, at 424; *see also* Adams, *Public Meetings*, *supra*, at 44. These are also the individuals most likely to speak at the meetings. Innes & Booher, *supra*, at 424.

4. Local Governments Serve A Critical Educative Function.

In the early decades of our republic, Alexis de Tocqueville observed that "[t]own meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it." de Tocqueville, *supra*, at 61. Similarly, John Stuart Mill referred to local governments as "schools of political capacity." John Stuart Mill, *Considerations on Representative Government* 274 (1861). De Tocqueville and Mill explained that participation in local governments provides citizens with skills and knowledge they can use to govern themselves in other contexts. This, in turn, benefits society at large. More recent scholars agree. "In face-to-face meetings, men and women can learn from each other, reason with one another, and search for common interests," causing "[p]olitical participation [to] become[] an educative device rather than an occasionally exercised civic obligation." Berry et al., *Urban Democracy*, *supra*, at 3; *see also* Joseph F. Zimmerman, *The New England Town Meeting: Democracy in Action* 188 (1999) ("[A]ssembly involves political interactions among

equals that educate and socialize the participants."); Carole Pateman, *Participation and Democratic Theory* 24-33 (1970).

Local government has thus always provided a first-hand means for citizens to experience the virtues of democratic government. It educates students, as well as adults, in civics and the democratic process at large. *See* Laura van Assendelft, *"City Council Meetings Are Cool": Increasing Student Civic Engagement Through Service Learning*, 4 J. Pol. Sci. & Educ. 86, 94-96 (2008) (finding pedagogic merit in students attending local government meetings). Throughout the country, students frequently attend town meetings.[3] This

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[3] Minutes from local public meetings around the country reflect that children often attend local meetings to receive recognition or awards and sometimes to make presentations to the meeting. For example, in Springdale City, Arkansas, children as young as eight are invited to give presentations following the invocation. *See* Springdale City, Ark., City Council Meeting, Apr. 9, 2013, http://www.springdalear.gov/document_center/Mayor/agendas/Council_Agenda_04_09_13__amended_.pdf (an 8 year old makes a presentation). And in Montgomery County, Maryland, awards are given to children after the opening religious gesture. *See* Montgomery County, Md., County Council Regular Session, July 16, 2013, http://montgomerycountymd.granicus.com/MediaPlayer.php?view_id=&clip_id=5509&caption_id=7615446Public (a young person is honored at 11:50). The same is true in many other localities. *See* City of Boston, Mass. City Council Meeting, July 10, 2013, http://meetingrecords.cityofboston.gov/sirepub/mtgviewer.aspx?meetid=146&doctype=MINUTES (children are clearly present at the meeting at 12:41); Dallas County, Tex., Commissioner Court, Mar. 15, 2011,

tradition continues in the Town of Greece; high school students attend Town Board meetings to fulfill a state-mandated civic education requirement. 2d Cir. App. A282-304, A779, A929.

C. Local Government Meetings Are Much More Intimate Than National Or State Legislative Sessions, And Thereby Impact The Practice Of Prayer.

Local public meetings represent the focal point of small communities. Attendees and speakers are neighbors, coworkers, parents, students, teachers, local business owners, town employees, and government leaders. "[F]amily or social ties may motivate citizens to attend public meetings," and those who attend largely know other attendees from outside the meeting. Katherine A. McComas, *Trivial Pursuits: Participant Views of Public Meetings*, 15 J. Pub. Rel. Res. 91, 109 (2003) [hereinafter McComas, *Trivial Pursuits*]. "In this sense councils are less set apart than are state and national legislatures." Heinz Eulau & Kenneth Prewitt, *Labyrinths of Democracy: Adaptations, Linkages, Representation, and Policies in Urban Politics* 312 (1973).[4]

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http://www.dallascounty.org/department/comcrt/agenda/files/2011Mar15f.pdf (scouts delivering invocation).

[4] Local governments typically serve far fewer people than state governments. For example, 85% of towns in the United States serve areas with less than 10,000 people as of 2013 (National Association of Towns and Townships, http://www.natat.org (last visited Sept. 12, 2013)), and over 90 percent of municipal governments serve fewer than 25,000 people. National League

The officials sitting on town councils, boards, or commissions are likewise familiar members of these communities. *See* J. Eric Oliver & Shang E. Ha, *Vote Choice in Suburban Elections*, 101 Am. Pol. Sci. Rev. 393, 397 (2007) (describing survey in which one third of respondents indicated that they personally knew a city council candidate). Officials and attendees at public meetings "frequently have ongoing relationships with each other" and are "not just unknown 'authorities' and 'public audiences.'" Karen Tracy & Margaret Durfy, *Speaking Out in Public: Citizen Participation in Contentious School Board Meetings*, 1 Discourse & Comm. 223, 225 (2007). Citizens who stand to speak at local meetings thus address not only their elected official but also their neighbor, their child's teacher, or their coworker. As two scholars observed based on their seminal study of eighty-two California city councils:

> Councilmen, unlike state and national legislators, live and work in the community they govern. Their children are in the same

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of Cities, *Number of Municipal Governments & Population Distribution* (2007), http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-structures/number-of-municipal-governments-and-population-distribution (last visited Sept. 12, 2013). In contrast, even the smallest state has more than 560,000 people, and the biggest has more than 37 million. U.S. Census Bureau, Table 1, Annual Estimates of the Population for the United States, Regions, States, and Puerto Rico, April 1, 2010 to July 1, 2012 (2012), http://www.census.gov/popest/data/state/totals/2012/tables/NST-EST2012-01.xls.

> schools as are those of their constituents; their wives are in the same clubs as are those of their fellow citizens; and they themselves are involved in a network of nongovernmental activities, both of a social and a business sort, which involve citizens from throughout the community. Direct contact between governors and governed is facilitated by the life-styles, business and professional associations, and leisure-time activities of the councilmen.

Eulau & Prewitt, *supra*, at 311-12.

The physical arrangements of local public meetings also distinguish them from national and state legislative sessions. Local public meetings are held in small, intimate spaces, Bryan, *supra*, at 103, and attendees generally sit facing the panel of officials conducting the meeting. McComas, *Trivial Pursuits*, *supra*, at 95. Consequently, unlike audience members sitting in a secluded legislative gallery, attendees at a public meeting are highly visible to local officials and to members of the community whom they know.

Taken together, the public, face-to-face contact among constituents, and between constituents and elected officials they may know, adds a personal element to governing that is absent from federal and state legislative sessions. "Above all else, town meeting is public talk—common people *standing* for something." Bryan, *supra*, at 139.

The intimacy and other features of local public meetings also affect the way prayer is practiced at such meetings and make it different from prayer before national or state legislatures. As discussed above, in federal and state legislatures, prayer sessions are for legislators, and citizens seated in the gallery are physically distanced from the prayer. In contrast, at local public meetings, citizens in attendance are participants in the decision-making process and sit near to the prayer giver. As a result, the prayer giver is likely to treat citizens as worshippers rather than audience members. Specifically, the prayer giver is likely to direct the prayer to the nearby citizens and ask them to participate. This effectively immerses the citizens in the prayer.

The practices in the Town of Greece exemplify prayer in a town meeting. Prayer is introduced by the Town Supervisor, typically described by the Supervisor as "our prayer," and offered by a prayer-giver who is close to and facing the public, who generally directs the prayer to the public, and who frequently asks citizens to participate. Resp's Br. at 23-24. Citizens present are thus treated more as congregants than as audience members. Indeed, this initial period of the public meeting in which "a seated audience fac[es] a podium or an expert panel" and listens to "some type of presentation" has been described as one in which a captive audience of citizens is assembled "much like a congregation sits before the clergy to listen to a sermon with various readings." Katherine McComas, John C. Besley & Laura W. Black, *The Rituals of Public Meetings*, 70

Pub. Admin. Rev. 122, 124, 127 (2010) [hereinafter McComas et al., *Rituals of Public Meetings*].

III. Official Prayers During Local Public Meetings Are Coercive.

The unique features of local public meetings make prayer at such meetings far more coercive than federal or state legislative prayer. Citizens cannot simply refrain from attending without losing something of great value: the opportunity to participate in policy decisions and obtain benefits that significantly impact their lives. Likewise, citizens cannot show up just for the comment period and still ensure they will be able to participate. Because local governments often do not have fixed schedules or do not adhere closely to published schedules, citizens who want to participate in a meeting generally must show up at the beginning. Moreover, in localities as different as St. Charles County, Missouri, and Clark County, Nevada, the public comment portion of the meeting occurs immediately after the invocation.[5] Other localities *require* that individuals be present at the beginning of a meeting in order to sign up to comment, as is true, for example, in East Baton Rouge Parish in

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[5] *See* St. Charles County, Mo., County Council Meeting, Apr. 8, 2013, http://council.sccmo.org/council/index.php?option=com_simplecalendar&view=detail&catid=139%3A2013-council-meetings&id=1907%3Ast-charles-county-council-meeting&Itemid=100159; Clark County, Nev., Board of Commissioners Meeting, June 18, 2013, http://clark.granicus.com/MinutesViewer.php?view_id=17&clip_id=3199.

Louisiana and in Troy, Michigan[6]). Finally, citizens hoping to persuade officials on a policy point often may not want to carry the social stigma of showing up after the prayer.

When citizens do attend public meetings at which prayer is offered, the intimate setting of the meetings and the presence of the officials whom attendees are seeking to influence will exert substantial pressure on citizens to participate in the prayer. This is made clear in the social science research on social pressure generally and in town meetings specifically.

A. Citizens Face Substantial Pressure To Participate In Prayers At Local Public Meetings.

The social science literature shows that in a town meeting setting that includes prayer, adults are susceptible to the same pressures to participate in prayer that this Court described in *Lee*. In *Lee*, based in part on psychological research on the susceptibility of adolescents to conformity, this Court found that prayer at a high school graduation coerced students in attendance to participate in a religious exercise. 505 U.S. at 593-94. The Court explained that the government's "supervision and

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[6] *See* East Baton Rouge Parish, La., Metropolitan Council Meeting, Apr. 10, 2013, http://batonrougela.swagit.com/play/05162013-694; City of Troy, MI, Rules of City Council Procedure, http://www.troymi.gov/Portals/0/Files/Council/2012-2013%20CouncilRules%2020130128.pdf.

control" of prayer as part of a high school graduation ceremony "place[d] public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction." *Id.* at 593. This pressure, in turn, constituted coerced participation. A "reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it," because remaining silent or standing during the prayer "was an expression of participation" and "the very point of the religious exercise." *Id.*

Similar pressures from local government authorities and other community members exist at local public meetings. Some of the attendees are themselves students attending as part of their education, as in Town of Greece. 2d Cir. App. A282-304, A779, A929. And social science shows that even adults in such settings face significant pressure to conform to practices endorsed by authorities and joined by a clear majority.

1. The Nearby Presence Of Local Officials Whom Citizens Are Seeking To Influence Pressures Citizens To Conform.

Unlike audience members sitting in a secluded legislative gallery who "are free to enter and leave with little comment and for any number of reasons," *Lee*, 505 U.S. at 597, attendees at local public meetings cannot simply exit during prayer. When the prayer-giver asks members of the public to stand, an individual's failure to do so is an overt act observable both by officials (generally seated nearby

on the dais facing the public) and by members of the community with whom he is likely to have "ongoing relationships." Tracy & Durfy, *supra*, at 225. Research shows that because of the face-to-face interactions, "[t]own meeting attendance is surely more demanding . . . psychologically than nearly any form of participation in representative systems." Bryan, *supra*, at 117.

Because the actions of public-meeting attendees are visible to local officials, attendees face significant pressure to conform. A citizen may fear that separating himself from the community and identifying himself as part of a distinct minority on religious matters will limit his ability to influence policy. That is a reasonable fear. Studies show that policymakers are more receptive to groups who adhere to their faith. *See* David Yamane, *Faith and Access: Personal Religiosity and Religious Group Advocacy in a State Legislature*, 38 J. Sci. Study Religion 543, 548-49 (1999). Studies also show that when an individual is perceived as being part of a minority or member of an "outgroup," members of the majority, such as town council members, will be more inclined to suspect the individual's motives. *See* Cecilia L. Ridgeway, *Conformity, Group-Oriented Motivation, and Status Attainment in Small Groups*, 41 Soc. Psychol. 175, 187 (1978) ("[Nonconformity] attracts the group's attention, but it also predisposes the group to negatively assess the nonconformer's motivation."). This suspicion of perceived members of outgroups is exacerbated in public settings. Jeffrey G. Noel et al., *Peripheral Ingroup Membership*

Status and Public Negativity Towards Outgroups, 68 J. Personality & Soc. Psychol. 127, 134-35 (1995).

The pressure faced by public-meeting attendees to avoid actions that could negatively impact their ability to influence local officials is further heightened by the significant interests at stake. Local officials have the ability to influence whether a citizen receives a zoning variance, for example, and where a new development will be permitted. Research shows that individuals recognize this dynamic, and will often conform their actions to those they believe will best enable them to obtain or avoid losing benefits from authority figures. As one scholar explained, individuals can be motivated by normative concerns about their "relations with others" depending on the "rewards/punishments [the others] can provide." Wendy Wood, *Attitude Change: Persuasion and Social Influence*, 51 Ann. Rev. Psychol. 539, 541 (2000).

Moreover, independent of the ability of authority figures to confer or deny benefits based on an attendee's participation in prayer, the mere presence of authority figures puts significant pressure on attendees to conform. As Stanley Milgram concluded in his famous studies on human obedience, many people will agree to perform even extreme acts—such as inflicting pain on strangers—if directed by an authority figure. *See* Stanley Milgram, *Behavioral Study of Obedience*, 67 J. Abnormal & Soc. Psychol. 371 (1963). That is so even when the authority figure has "no special powers to enforce his commands" and "[t]o disobey would bring no material loss to the

subject"; the authority figure's mere endorsement is enough to prompt the acts. *Id.* at 376. And the likelihood that individuals will follow the direction of the authority figure increases substantially when their interactions with those figures is face-to-face. Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 Hum. Rel. 57, 65-66 (1965).

More recent research has confirmed that Milgram's conclusions remain valid. Jerry M. Burger, *Replicating Milgram: Would People Still Obey Today?*, 64 Am. Psychol. 1, 9 (2009). One study explained, for example, that "[c]loseness of the authority to the subject also had a pronounced effect." Thomas Blass, *Understanding Behavior in the Milgram Obedience Experiment: the Role of Personality, Situations, and Their Interactions*, 60 J. Personality & Soc. Psychol. 398, 399 (1991). Other research has verified that "[d]eference to authorities is linked to the social bond between group members and the group." Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities*, 1 Personality & Soc. Psychol. Rev. 323, 338 (1997). In town meetings, as described above, authorities are close to the citizens, have a social bond with them, and also have the ability to materially impact those citizens through their decisions.

2. *The Visibility Of The Actions Of Attendees To Their Peers Places Substantial Pressure On Them To Conform.*

Attendees also face pressure to conform from their peers. There is substantial evidence in the social science literature that when an individual publicly conducts activities in front of people he knows, the individual is especially likely to conform to the majority's views to avoid social exclusion. Robert B. Cialdini & Noah J. Goldstein, *Social Influence: Compliance and Conformity*, 55 Ann. Rev. Psychol. 591, 607-08 (2004) (reviewing literature on perceived consensus). This is especially true when the issues at stake involve normative content. *Id.* For example, Jane Mansbridge's classic study of Vermont town meetings concluded that, in the intimate environment of a town meeting, "the greater publicity of one's own act and the greater sanction of one's neighbor's visible disapproval in a face-to-face situation can stimulate conformity to the majority against one's own real interests." Mansbridge, *supra*, at 273. Mansbridge explained that "friendship as well as fear" led individuals to refrain from deviating from a clear majority and made the town appear to act with greater consensus than it might otherwise have. *Id.* at 60. Adding to this pressure, "face-to-face contact, along with exposing one publicly to being a fool, makes the disagreements people voice seem more like personal criticism," because "ideas can rarely be divorced from the personalities of their advocates." *Id,* at 63. Information provided at meetings from those who speak up is therefore

"dressed in the personality of particular human beings." *Id.*

The intimacy of public meetings also makes citizens holding minority viewpoints "vulnerable to ostracism." Laura R. Woliver, *Mobilizing and Sustaining Grassroots Dissent*, 52 J. Soc. Issues 139, 141 (1996). In some situations, neighbors and fellow citizens will go so far as to openly "resent dissenters, and tell them that their mobilization will harm property values, chase away employers, and make matters worse." *Id.* In order "[t]o preserve an atmosphere of agreement" often valued in a small community, more powerful participants who are faced with dissent are thus "likely to withhold information and to exert subtle pressures that often work ultimately to the disadvantage of the least powerful." Mansbridge, *supra*, at 70-71.

Given these dynamics, Mansbridge's interviews with community members are rife with allusions to the pressures they feel in the public meeting setting. *Id.* at 60-65. "Altogether more than a quarter" of those Mansbridge interviewed "suggested without prompting that the conflictual character of the town meeting in some way upset them." *Id.* at 65. To residents, differences of opinion cannot be "dissociated from bitter personal disputes among individuals," and "[i]n a town [so] small, your enemies are also your neighbors for life." *Id.* at 63, 64. Thus, "[t]he informality that lets some townspeople feel that they are part of an intimate community also emphasizes to outsiders that they are not." *Id.* at 70.

This research on town meetings is consistent with social psychology research showing that when a majority of peers has a unified position, other individuals will feel significant pressure to conform. Specifically, once a critical number of people is reached—typically four to five—agreement among the majority will impose coercive pressure on the remaining members of the group to support the majority's viewpoint. *See, e.g.*, Solomon E. Asch, *Opinions and Social Pressure*, 193 Sci. Am. 31, 35 (1955) (groups of four); Chester A. Insko et al., *Conformity and Group Size: The Concern with Being Right and the Concern with Being Liked*, 11 Personality & Soc. Psychol. Bull. 41 (1985) (groups of five). The pressure to "conform[] is higher in face-to-face groups" such as town meetings. Rob Bond, *Group Size and Conformity*, 8 Group Processes & Intergroup Rel. 331, 335 (2005); *see also* Insko et al., *supra*, at 47. And it is further elevated with respect to religion. *See* Lynne M. Jackson & Bruce Hunsberger, *An Intergroup Perspective on Religion and Prejudice*, 38 J. Sci. Study Religion, 509, 518-19 (1999) (indicating that, in a group setting, individuals in the religious minority are likely to be subjected to pressure and prejudice).

The pressures individuals face in local public meetings may lead attendees to conform through their silence rather than by adopting the view of the majority or of the authority figures. Mansbridge's study showed that these pressures lead some community members, particularly the poorer and less-educated, to refrain from attending meetings at all, or to avoid speaking when they do attend. *See*

Mansbridge, *supra*, at 61. Another study of town meetings in upstate New York also found that those who believed they held minority views were less likely to participate. McComas, *Trivial Pursuits*, *supra*, at 106. As the survey results in that study show, the "fear of social isolation" pressures "individuals either to express or repress their opinions, depending on their perceived accordance with the climate of opinion." *Id.* (citation omitted).

Studies in the communications field have similarly demonstrated that a "spiral of silence" often develops around a widely-held majority belief. Elisabeth Noelle-Neumann, *The Spiral of Silence: A Theory of Public Opinion*, 24 J. Comm. 43, 44-45 (1974). Practically speaking, this means that when a belief is widely held, an individual with a different view will often feel compelled to remain silent. *See generally* Elisabeth Noelle-Neumann, *The Spiral of Silence: Public Opinion, Our Social Skin* (2d ed. 1993). A comprehensive review of the studies shows that the spiral of silence effect is greater, or even "only" present, for issues with a strong moral or value-normative component. *See* Dietram A. Scheufele & Patricia Moy, *Twenty-Five Years of the Spiral of Silence: A Conceptual Review and Empirical Outlook*, 12 Int'l J. Pub. Opinion Res. 3, 10 (2000). Prayer, of course, has such a component.

Together, this research demonstrates that the intimacy of public meetings may "legitimize existing power dynamics between citizens and public officials." McComas et al., *Rituals of Public Meetings*, *supra*, at 127. These dynamics are only exacerbated

for individuals who are in both a policy minority and a religious minority. If a public meeting starts with prayer, such individuals have to risk separating themselves from the community twice if they want to leave the room for the prayer and later articulate their unorthodox view on policy. In light of these risks, prayer can make the difference between an individual with a controversial view contributing to a discussion about a local issue that personally affects him, or simply sitting in silence, believing that his opinion is not welcome. Non-participation therefore hurts the basic operation of the meeting as well as the non-adherent himself. Local government *depends* on experiential input to properly function, and can provide its core functions only if a cross-section of citizens participate. Berry, *Urban Interest Groups*, *supra*, at 505; Adams, *Public Meetings*, *supra*, at 43.

And from a constitutional perspective, with respect to religion, the logic of this Court's cases dictates that the Establishment Clause forbids the government from using the power dynamics of public meetings to pressure individuals to promote a religious creed. Prayer before public meetings endorsed by local officials and joined by community members does just that. When these officials introduce a prayer-giver who asks citizens to participate, and virtually all citizens do stand, it places substantial pressure on members of religious minorities to stand or otherwise submit to the collective practice. Much like in *Lee*, "[f]inding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting." 505 U.S. at 593.

B. The Educative Function Of Local Public Meetings Renders Prayer Particularly Inappropriate.

Because town meetings are primary schools for liberty, which teach citizens "how to use and how to enjoy" that liberty, the message conveyed through these meetings is critical. de Tocqueville, *supra*, at 61. John Stuart Mill emphasized that the educative effects of local democracy are diminished for those who feel excluded from "all the privileges of citizenship." Michael E. Morrell, *Deliberation, Democratic Decision-making and Internal Political Efficacy*, 27 Pol. Behav. 49, 51-52 (2005) (explaining Mill's view).

When local government engages in prayer, it conveys a message of exclusion. It leaves citizens with the impression that, notwithstanding Constitutional guarantees, the government may affiliate itself with the religious beliefs held by the majority and oblige its citizens to participate as a condition of political empowerment. This is particularly problematic when children are in attendance, and their first look at democracy in action involves state-sponsored religion in which they are asked and feel pressured to participate.

Opening a local public meeting with a prayer also immediately calls the neutrality of the forum into question. The prayer implies a common belief among all those present, and signals to those who do not share that belief that they are in the minority. In time, such prayer teaches citizens that the ability to participate effectively in local government depends

upon their willingness to accede to a religious belief they do not hold. This is deeply problematic. As one group of scholars described, "citizen participation is at the heart of democracy," and "any system that denies equal participatory rights vio..tes a fundamental principal of democracy." Sidney Verba et al., *Voice and Equality* 1, 10 (1995).

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-696

In the Supreme Court of the United States

TOWN OF GREECE, PETITIONER

v.

SUSAN GALLOWAY AND LINDA STEPHENS, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR UNITED STATES SENATORS MARCO RUBIO, LAMAR ALEXANDER, JOHN BARRASSO, ROY BLUNT, JOHN BOOZMAN, RICHARD BURR, SAXBY CHAMBLISS, JEFF CHIESA, DAN COATS, BOB CORKER, JOHN CORNYN, MIKE CRAPO, TED CRUZ, MIKE ENZI, DEB FISCHER, LINDSEY GRAHAM, ORRIN HATCH, JOHN HOEVEN, JIM INHOFE, JOHNNY ISAKSON, MIKE JOHANNS, RON JOHNSON, MARY LANDRIEU, MIKE LEE, MITCH MCCONNELL, JERRY MORAN, ROB PORTMAN, JIM RISCH, PAT ROBERTS, TIM SCOTT, JOHN THUNE, PAT TOOMEY, DAVID VITTER, AND ROGER WICKER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Establishment Clause of the First Amendment invalidates a practice of legislative prayer in which those offering the invocation are permitted to pray in accordance with the particular language of their own faiths and the dictates of their own consciences, in keeping with "[t]he unbroken practice for two centuries in the National Congress" and the Framers' view that this practice poses "no real threat" of establishing religion. *Marsh* v. *Chambers*, 463 U.S. 783, 795 (1983).

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are a bipartisan group of thirty-four United States senators who share the conviction that legislative prayer is a vital and constitutionally protected part of their work as elected officials. In particular, they believe that those who pray in our Nation's legislatures must be free to do so in accordance with the language of their own religious traditions and the dictates of their consciences.

America's tradition of appointing legislative chaplains and solemnizing legislative sessions with prayer dates to the Founding. The First Congress, which drafted the First Amendment, appointed the congressional chaplains who have prayed for and ministered to members of Congress ever since. Similarly, many state and local legislatures have followed Congress's unbroken tradition of joining in prayer to seek divine guidance concerning the important work before them. And it is the considered judgment of the Senate, notably expressed by the First Congress and in an 1853 Report of the Senate Judiciary Committee, that legislative chaplaincies and the related practice of opening each session with prayer are constitutional—not an establishment of religion.

The work of the Senate is often divisive. But for a few moments each morning, politics and party are set

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[1] The parties consented to this filing. Their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amici* and their counsel, has contributed monetarily to the brief's preparation or submission.

aside. Instead of debate, senators reflect on their duty to represent every constituent, mindful of the Nation's core values and their need for divine assistance in carrying out their responsibilities.

If allowed to stand, the Second Circuit's decision would threaten this tradition. That decision sends a troubling message to legislatures—that "no substantive mixture of prayer language" will "necessarily avert the appearance of affiliation," and that "even a single circumstance may appear to suggest an affiliation" with a particular faith. Pet. App. 25a, 27a. The court went so far as to warn that "[t]hese difficulties may well prompt municipalities to pause and think carefully before adopting legislative prayer." Pet. App. 27a.

This Court should eliminate the uncertainty and affirm the strong constitutional footing on which legislative prayer stands. In a nation of broad religious diversity, the best means of ensuring that the government does not prefer any particular religious view in the context of legislative prayer is to allow all those who pray to do so in accordance with their own consciences and in the language of their own faiths. Only this approach respects the "unbroken practice * * * in the National Congress" and the Framers' view that this practice poses "no real threat" of establishing religion. *Marsh* v. *Chambers*, 463 U.S. 783, 795 (1983).

STATEMENT

Since 1999, the Town of Greece, New York, has permitted its citizens to open its monthly board meetings with prayer. Citizens of any faith may volunteer to give the invocation, and no volunteer has ever been denied the opportunity to pray.

Those offering invocations are permitted to pray in accordance with the language of their own faiths and the dictates of their own consciences. The Town has never asked to review a prayer before its delivery, or restricted a prayer's content. Although prayers have been offered by adherents of various faiths—ranging from Jews to Wiccans—most have identified themselves as Christian. Thus, most of the prayers have referred to Jesus, or to Christian theology.

Reasoning that "an objective, reasonable person would believe that the town's prayer practice had the effect of affiliating the town with Christianity" (Pet. App. 24a), the Second Circuit struck it down under the Establishment Clause. In particular, the court objected to "the prayer-giver selection process," which typically produced Christian clergy, "the content of the prayers," which often included "uniquely Christian references," and "the contextual actions (and inactions) of prayer-givers and town officials," which included praying in the "first-person-plural" and town officials "bowing" their heads or saying "Amen." Pet. App. 19a-23a. But according to the court, it was not "any single aspect of the town's prayer practice" that warranted invalidating that practice; it was "the interaction of the[se] facts"—"the totality of the circumstances." Pet. App. 24a, 26a.

The Second Circuit did not consider whether its analysis would require striking down the practice of

legislative prayer in Congress—whose practice and understanding of the Constitution from the Founding through modern times informed this Court's decision to sustain legislative prayer in *Marsh*. But the practices that the court found unacceptable generally reflect the practice of legislative prayer in Congress.

SUMMARY OF ARGUMENT

I. *Marsh* v. *Chambers*, 463 U.S. 783, 786 (1983), sustained legislative prayer on the ground that the practice was instituted by the authors of the Establishment Clause and "ever since * * * has coexisted with the principles of disestablishment and religious freedom." The Second Circuit held that *Marsh* invalidates a legislative prayer practice that produces a majority of prayers that the court deemed "sectarian" —in particular, prayers referring to Jesus. But the Establishment Clause does not forbid a legislative prayer practice open to all citizens—of any faith—in which chaplains or guest chaplains are free to pray in accordance with their own consciences and the particular language of their own religions.

From the Founding until today, that has been the practice in Congress. And while the range of faiths represented has broadened over time—in keeping with our Nation's growing religious diversity—even today a substantial percentage of the prayers offered in Congress use explicitly Christian language. The Second Circuit's reading of *Marsh* cannot be squared with the reasoning of this Court's opinion or the unbroken, 200-year history upon which it relied.

II. Not only is it improper to read *Marsh* as requiring the removal of references to particular deities from legislative prayers, but that reading also unnecessarily puts *Marsh* in conflict with several other

lines of this Court's precedent. Any attempt to distinguish between "sectarian" and "nonsectarian" prayers requires courts (and those executing their orders) to make *theological* judgments about which prayers pass muster. But numerous decisions of this Court forbid such determinations, which "entangle" the state in theology and establish a government-approved religious orthodoxy. Religious doctrine is far too complex—and too precious—to be governed by tests such as the Second Circuit's "objective, reasonable person" standard. And it is beyond civil courts' constitutional authority to administer such tests.

III. Finally, the Court "must have 'due regard to the fact that [it] is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.'" *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citation omitted). Enforcing the line drawn by the court below—a theological line between "sectarian" and "nonsectarian" prayers—is wholly unworkable and constitutes a grave affront to the internal workings of a coequal branch of government. Thus, principles of federalism, comity, and the separation of powers further support sustaining legislative prayer.

ARGUMENT

I. The unbroken 200-year practice of legislative prayer upheld in *Marsh* confirms that legislators, their chaplains, and their guests may pray freely in accordance with conscience and their own religious language.

In sustaining the practice of legislative prayer in *Marsh*, this Court found it dispositive that the Congress that drafted the First Amendment did not view legislative prayer as a violation of the Establishment Clause. As the Court recounted, "the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer," and just "three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights." 463 U.S. at 787-788.

The Court went on to explain that enactments of the Congress that framed the First Amendment are "weighty evidence of its true meaning," and that "an unbroken practice * * * is not something to be lightly cast aside." *Id.* at 790. "It can hardly be thought," the Court stated, "that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable." *Ibid.* Moreover, "it would be incongruous to interpret that Clause as imposing more stringent First Amendment limits on the States than the draftsmen imposed on the Federal Government." *Id.* at 790-791 (citations omitted).

In light of this evidence of original meaning, the Court in *Marsh* concluded that legislative prayers are not even a "step toward establishment," but rather reflect a "tolerable acknowledgment of beliefs widely held among the people of this country," "whose institutions presuppose a Supreme Being." *Id.* at 792 (citations omitted). "The unbroken practice for two centuries in the National Congress and for more than a century in * * * many * * * States," the Court noted, "gives abundant assurance" that the practice poses "no real threat" of erecting "the establishment the Founding Fathers feared." *Id.* at 795.

As the Court in *Marsh* understood, such historical evidence concerning the practice of legislative prayer illuminates the constitutional principles embodied in the Establishment Clause. "[C]onstructions of the Constitution made by * * * the Congress that launched the government" and "propos[ed] * * * the first 10 amendments" for "ratification * * * have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument." *Myers* v. *United States*, 272 U.S. 52, 174-175 (1926). All the more so where this "contemporaneous construction of the Constitution" has "since [been] acted on with * * * uniformity in a matter of much public interest and importance." *Cooley* v. *Board of Wardens*, 53 U.S. 299, 315 (1851); accord *Printz* v. *United States*, 521 U.S. 898, 905 (1997); *McGrain* v. *Daugherty*, 273 U.S. 135, 156-157, 174 (1927). Here, a careful review of the relevant history confirms that legislators, their chaplains, and their invited guests may pray in accordance with the language of their own faiths and the dictates of their own consciences—even if a majority of the resulting prayers reflect the beliefs of a particular faith.

A. The Framers of the Constitution endorsed legislative prayers that identified with a particular faith.

The practice of opening legislative sessions with prayer dates to the birth of our Republic, when the Continental Congress adopted the practice despite concerns about the divergent faiths of the delegates. As John Adams recounted,[2] a motion to open the Continental Congress's session with prayer was opposed by John Jay, who argued that the delegates were "so divided in religious Sentiments, some Episcopalians, some Quakers, some [A]nabaptists, some Presbyterians and some Congregationalists * * * that [they] could not join in the same Act of worship." *Ibid.* In response, "Mr. S Adams arose and said he was no Bigot, and could hear a Prayer from a Gentleman of Piety and Virtue, who was at the same time a Friend to his country." *Ibid.*

Samuel Adams then moved to invite a local Anglican minister, Jacob Duché, to lead a prayer the next morning. The motion carried, Duché's prayer met with wide approval, and the practice of opening sessions with prayer continued. *Ibid.* *Marsh* cited the Jay-Adams "interchange" as establishing "that the delegates did not consider opening prayers as a proselytizing activity or as symbolically placing the government's 'official seal of approval on one religious view.'" 463 U.S. at 792 (citation omitted).

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[2] Letter from John Adams to Abigail Adams (Sept. 16, 1774), *in* 1 *Letters of Delegates to Congress* 1774-1789, at 75 (Paul Smith *et al.*, eds., 1976) (hereinafter, "Smith, *Letters*").

Duché's prayer was addressed to the "Lord, our heavenly father, King of Kings and Lord of lords," and concluded as follows: "All this we ask in the name and through the merits of Jesus Christ thy son, Our Saviour, Amen."[3] See also Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 217 (1986) (the Continental Congress "sprinkled its proceedings liberally with the mention of God, Jesus Christ, [and] the Christian religion"). Thus, the prayer that *Marsh* cited to illustrate that prayer need not "proselytize" or approve "one religious view" used language that the court below deemed unduly sectarian.

Invocations using explicitly Christian language continued in the First Congress. The first two Senate chaplains, Samuel Provoost and William White, were Episcopal bishops who followed *The Book of Common Prayer*.[4] Chaplain White, who served from 1790 until 1800, described his practice as follows:

> My practice, in the presence of each house of congress, was in the following series: the Lord's prayer; the collect Ash Wednesday; that for peace; that for grace; the prayer for the President of the United States; the prayer for Congress; the prayer for all conditions of men; the general thanksgiving; St. Chrysostom's Prayer; the grace of the Lord Jesus Christ, etc.

Bird Wilson, *Memoir of the Life of the Right Reverend William White, D.D., Bishop of the Protestant Episco-*

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[3] 25 Smith, *Letters*, at 551-552.

[4] *The Book of Common Prayer* (1789 American ed.), available at http://justus.anglican.org/resources/bcp/1789/1790/.

pal Church of the State of Pennsylvania 322 (1839) (Letter to Rev. Henry V. D. Johns, Dec. 29, 1830).

Notably, every prayer that White listed either appealed to Jesus or made other Christian references. *A Prayer for Congress*, for example, closes by stating: "These and all other necessaries * * * we humbly beg in the Name and mediation of Jesus Christ, our most blessed Lord and Saviour." *Book of Common Prayer* (Philadelphia, Hall & Sellers 1790) (unpaginated).[5] Thus, those "who wrote the First Amendment Religion Clauses" and established the practice of legislative prayer (*Marsh*, 463 U.S. at 788)—whose "actions reveal their intent" in drafting the Establishment Clause (*id.* at 790)—routinely heard explicitly Christian prayers.

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[5] See also *ibid.* (The Collect for Peace, ending "through the might of Jesus Christ our Lord"; The Collect for Grace, ending "through Jesus Christ our Lord"; *A Prayer for the President of the United States, and all in civil authority*, ending "through Jesus Christ our Lord"; *A Prayer for all Conditions of Men*, ending "[a]nd this we beg for Jesus Christ's sake"; *A General Thanksgiving*, ending "through Jesus Christ our Lord; to whom with thee and the Holy Ghost, be all honour and glory, world without end"; *A Prayer for St. Chrysostom*, including a reference that "when two [or] three are gathered together in thy Name, thou will grant their requests"; "The Grace of our Lord Jesus Christ, and the love of God, and the fellowship of the Holy Ghost, be with you all" (quoting 2 *Corinthians* 13:14)).

B. The Congresses of the nineteenth, twentieth, and twenty-first centuries continued the practice of allowing legislative prayer in accordance with conscience.

The Congresses of the nineteenth, twentieth, and twenty-first centuries followed their forebears' example, routinely opening their sessions with prayer. As outlined in Part I.C, this practice has broadened over time in keeping with the Nation's growing religious diversity. Initially, however, the practice was exclusively Christian. And regardless of their background, those praying have always been free to use the distinctive language of their own faiths.

1. At the outset of the Civil War, for example, a representative prayer petitioned "that the disorders of the land may be speedily healed * * * and that Thy Church and Kingdom may flourish in a larger peace and prosperity, for Thy Son, our Savior, Jesus Christ's sake." Cong. Globe, 37th Cong., 1st Sess. 1 (1861); see also Cong. Globe, 36th Cong., 2d Sess. 1-2 (1860) (House: "Unto Thee we come, trusting in the atonement of our Lord and Savior, Jesus Christ, and in the sanctifying influence of the Holy Spirit * * * [G]rant us Thy special aid"). Similarly, in December 1861, a guest Navy chaplain thanked God for "Christ, and for the great salvation, and for the hope of heaven" in asking "thy blessing upon this body of Senators, upon thy servant their President, and upon all Members of this body." Cong. Globe, 37th Cong., 2d Sess. 1 (1861).

2. Several chaplains have had a practice of leading the Senate in reciting the Lord's Prayer. As noted above (at 9), the second Senate Chaplain, William White, regularly followed this practice. In 1893, Sen-

ate Chaplain John George Butler asked God to "Bless the two Houses of Congress now assembling," and to guide them in their work, before leading the Chamber in the Lord's Prayer. 25 Cong. Rec. 197 (1893). Senate Chaplain Edward Elson, who served from 1969 to 1981, had a "first day tradition" of opening sessions of Congress by leading the Senate in that prayer. 127 Cong. Rec. 1 (1981); 125 Cong. Rec. 135 (1979); 123 Cong. Rec. 3 (1977); 121 Cong. Rec. 3 (1975); see *Prayers by Chaplain Edward L.R. Elson, 96th and 97th Congresses, 1979-1981*, S. Doc. No. 97-39, 1 (1983).

3. Invocations using explicitly Christian language continued throughout the twentieth century. In 1947, for example, Senate Chaplain Peter Marshall asked the "Lord Jesus" to "put [His] arm around [the Senators] to give them strength," concluding: "[W]e humbly ask in Jesus' name." *The Prayers of Peter Marshall* 129 (1954). And in 1983, when *Marsh* was decided, more than 95 percent of invocations offered in the Senate used identifiably Christian language or references. See, *e.g.*, 129 Cong. Rec. 4055 (1983) ("In the name of the Father and the Son and the Holy Spirit."); 129 Cong. Rec. 2278 (1983) ("In the name of the God of Israel and His Son, our Savior."); 129 Cong. Rec. 260 (1983) (opening with a reading from *Jeremiah* and closing: "In the name of Him who loved us unconditionally and who prayed on the cross for the forgiveness of those who put him there. Amen.").

In fact, one-third of the prayers in 1983 invoked Jesus' name. See, *e.g.*, *Prayers Offered by the Chaplain of the Senate of the United States—Reverend Richard C. Halverson*, S. Doc. 98-43, 23 (1984) (concluding "in the matchless name of Jesus, the Humble

Servant of all"); 129 Cong. Rec. 2113 (1983) ("we pray in the name of the Utterly Selfless Servant, Jesus Christ"); 129 Cong. Rec. 4919 (1983) ("This we pray in the name of Jesus Christ, whose greatness exceeds the containment of any political, social, or religious body and whose exaltation in time will draw all men to Himself."). Indeed, on April 20, 1983—when *Marsh* was argued—Senate Chaplain Richard Halverson closed his prayer, "in the name of Jesus, Savior and Lord." 129 Cong. Rec. 9093 (1983).

Legislative prayers that include explicitly Christian references remain commonplace today. In 2012, for example, dozens of prayers in Congress referred to Jesus or "Christ." *E.g.*, 158 Cong. Rec. S4379 (daily ed. June 24, 2012) ("This we pray in the matchless name of Jesus Christ our Lord."); 158 Cong. Rec. S5419 (daily ed. July 26, 2012) ("We pray all this is Jesus's name."); 158 Cong. Rec. S2745 (daily ed. Apr. 26, 2012) ("In Jesus's name we pray."). In addition, many prayers are offered in the first-person plural. *E.g.*, 158 Cong. Rec. S1559 (daily ed. Mar. 12, 2012) ("Let us pray"); 158 Cong. Rec. S2559 (daily ed. Apr. 23, 2012) ("We pray in Your sacred Name").

4. The need for a practice of uninhibited legislative prayer is underscored by the fact that such prayer often marks occasions of national turmoil or personal grief. The Senate is at once the Nation's highest legislative chamber and a small body of just one hundred members living away from home. Senators often feel compelled to seek divine guidance in times of personal loss or national strife. Some of the Nation's most important events have been marked in the Senate by thoughtful prayers that echoed the public sentiment, whether of grief or jubilation.

In 1862, for example, Reverend Byron Sunderland marked the death of eleven-year-old Willie Lincoln, son of President Abraham Lincoln, with a heartfelt prayer: "Our thoughts have been suddenly arrested by the dark shadow of domestic and personal affliction which has fallen now upon the heart and home of the President." Cong. Globe, 37th Cong., 2d Sess. 909 (1862). In 1941, following the attack on Pearl Harbor, the Senate took time for prayer. 87 Cong. Rec. 9503 (1941). In 1945, the Senate celebrated the defeat of the Nazi regime with a prayer to God, "who has brought us to this shining hour." 91 Cong. Rec. 4370 (1945). Months later, the Senate celebrated victory over Japan with prayer: "Over a world dyed dark with suffering breathes the deep, sweet sigh of peace, and countless hearts break forth in praise and unutterable thanksgiving to Thee who wast our shield and our shelter when the earth did tremble, which now is still." 91 Cong. Rec. 8317 (1945) (alluding to *Psalm* 18).

The trials and triumphs of the 1960s were likewise commemorated with prayer. The legislative day that brought passage of the Civil Rights Act in the Senate began with a prayer asking "Infinite God, our Father" to "grant us wisdom to know what is right, and the courage to do it." 110 Cong. Rec. 15777 (1964). Years later, when Senator Robert Kennedy was assassinated, Reverend Edward Lewis of Capitol Hill United Methodist Church prayed: "[A] worthy Member of this U.S. Senate has been slain by an assassin's gun * * * Tragedy upon tragedy is being written as our contemporary history. Have mercy upon us, O God. Forgive us. Guide us. Give to us a sense of divine direction in our confusion." 114 Cong. Rec. 16149 (1968).

More recently, after the horrific 1999 shooting at Columbine High School, Senate Chaplain Lloyd Ogilvie prayed: "This morning, we are shocked by the accounts of the shooting of fellow students by disaffected young men filled with hate and anger. * * * O Lord of Hosts, be with us yet, lest we forget to love you and glorify You by respecting the wonder of each person's life. Through our Lord and Savior. Amen." 145 Cong. Rec. 7095 (1999).

Similarly, when the Senate convened in the wake of the September 11, 2001, terrorist attacks, the Chaplain appealed for divine help in gaining "victory over tyranny": "Almighty God, source of strength and hope in the darkest hours of our Nation's history * * * . Quiet our turbulent hearts. Remind us of how You have been with us in trouble and tragedies of the past and have given us victory over tyranny. * * * You are our Lord and Saviour. Amen." 147 Cong. Rec. 16865 (2001). Then-Senate Majority Leader, Tom Daschle, thanked the Chaplain, stating: "I know he speaks for us all." *Ibid.*

The only meaningful constraints upon prayers in Congress have been those imposed by the conscience and the good will of those praying. *Amici* have found these constraints to produce prayers that respect the solemnity of the occasion and the varied beliefs of those listening.

C. Congress continues the practice of legislative prayer according to conscience today with invocations from a variety of religious traditions.

As our Nation has grown in religious diversity, the range of prayers offered in the Senate has grown with it. For example, such prayers have long included in-

vocations from rabbis, and more recently from imams and leaders of Eastern religions. But whatever their background, those praying have always been free to do so in the language of their own religion.

The Congressional Record is filled with prayers offered by Jewish rabbis. In 1957, for example, the Senate welcomed a Holocaust survivor, Rabbi Arthur Schneier, to give the invocation. He prayed: "Heavenly Father, on the 10th anniversary of my arrival on these blessed shores, after years of Nazi and Communist persecution, I lead Thy children in prayer for our country, these United States of America, the land dedicated to the sanctity of man, the invigorating spring of liberty where the oppressed may quench their thirst." 103 Cong. Rec. 6651 (1957).

As recently as May 23, 2013, Senator Christopher Coons welcomed Rabbi Michael Beals to lead the prayer. He took the opportunity to pray for victims of the recent tornado in Oklahoma, using a name for God that has been part of the Jewish liturgy since the fifteenth century: "Adon Olam, Master of the Universe." 159 Cong. Rec. S3791 (daily ed. May 23, 2013).[6]

In 1992, the Senate heard its first prayer from a Muslim leader. At the invitation of then-Senators Paul Simon and Alan Dixon of Illinois and Senator Orrin Hatch of Utah, Imam Wallace Mohammed of Chicago prayed to "Our Creator, the merciful benefactor, the merciful Redeemer" (138 Cong. Rec. 1718 (1992))—an Islamic description of Allah derived from

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[6] Macy Nulman, *The Encyclopedia of Jewish Prayer: The Ashkenazic and Sephardic Rites* 7-8 (1996) (defining "Adon Olam" as "Eternal Lord").

the first verse of the Qu'ran. *Al-Fatiha* 1:1. In 2001, Muslim leader Imam Yusuf Saleem prayed, invoking "the Holy Qur'an Guidance to humanity," which states that "'God has honored all of the children of Adam.'" 147 Cong. Rec. 20554 (2001).

In 2007, Senator Harry Reid invited Rajan Zed, a Hindu, to offer the invocation. In keeping with Hindu conceptions of the divine, he prayed the Gāyatrī Mantra—a Hindu prayer "honor[ing] the sun as the giver of all things"[7] found in *Rig Veda* 3.62.10, one of the four canonical sacred texts (*śruti*) of Hinduism known as the Vedas: "We meditate on the transcendental Glory of the Deity Supreme, who is inside the heart of the Earth, inside the life of the sky, and inside the soul of the Heaven. May He stimulate and illuminate our minds." 153 Cong. Rec. 18657 (2007).

In sum, while the language of legislative prayer in the Senate continues to become ever more diverse, the Senate's practice of allowing prayer in accordance with conscience has remained constant. As discussed below, the Second Circuit's analysis would threaten this "unambiguous and unbroken history of more than 200 years." *Marsh*, 463 U.S. at 792.

D. The Second Circuit's analysis cannot be reconciled with *Marsh*, and would threaten Congress's unbroken 200-year tradition of legislative prayer.

The Second Circuit's reasoning cannot be squared with *Marsh*. The court disclaimed reliance upon "any single aspect of the town's prayer practice," reasoning that, under "the totality of the circumstances," that

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[7] *Contemporary Hinduism: Ritual, Culture, and Practice* 127 (Robin Rinehart, ed., 2004).

practice "identified the town with Christianity in violation of the Establishment Clause." Pet. App. 19a, 21a. If applied to Congress, however, the factors cited by the court below would threaten the very "unbroken practice" approved in *Marsh*. 463 U.S. at 788.

For example, the court below disapproved of the fact that the town's clergy-selection process resulted in Christians delivering "every one of the prayers for the first nine years of the town's prayer practice, and nearly all of the prayers thereafter." Pet. App. 19a. But the same can be said of the Senate's practice.

Since the creation of its chaplaincy in 1789, there have been 62 Senate chaplains—all of whom have identified themselves as Christian.[8] Indeed, the first eight Senate chaplains, who served for the first nineteen years of the chaplaincy, were members of the same religious denomination (the Episcopal Church), and offered prayers according to that denomination's prayer book (*The Book of Common Prayer*). And contrary to the Second Circuit's analysis, *Marsh* itself rejected arguments that appointing a single Presbyterian chaplain for 16 years invalidated Nebraska's legislative prayer practice. 463 U.S. at 793.

Similarly, the Second Circuit found it objectionable that many who prayed used "uniquely Christian" language, such as "the name of Jesus Christ," or "Christ * * * 'Our Savior,'" or the "Holy Trinity," while few prayers were "devoid of such references" or "employed references unique to some other faith." Pet. App. 20a, 21a. Again, the same is true of the Senate's practice, in which chaplains and guest chap-

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[8] http://www.senate.gov/artandhistory/history/common/briefing/Senate_Chaplain.htm.

lains are permitted to pray in their own religious language. See *supra* Part I.A-C. To be sure, the range of represented faiths has broadened as Americans have become more religiously diverse. But even today, a large percentage of these prayers contain explicitly Christian content. See *supra* Part I.B.

Unlike the decision below, *Marsh* did not rely on a distinction between "sectarian" and "nonsectarian" prayer. The sole appearance of the term "nonsectarian" in *Marsh* was a reference to the chaplain's own description of his prayers, and the Court did not suggest removing language specific to particular faiths. 463 U.S. at 793. To the contrary, it discouraged "a sensitive evaluation" of, or "pars[ing] the content of a particular prayer" absent "indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-795. As history confirms, the fact that legislative prayers explicitly refer to particular deities does not mean this standard is violated.

The Second Circuit even deemed it objectionable that those praying may be unable to "resist th[e] temptation" to "convey their views of religious truth." Pet. App. 26a. But this is no less true of prayers offered in the Senate. Not surprisingly, the court did not explain how prayer, which by definition is addressed to a deity, could avoid embodying *some* understanding of "religious truth." All prayers reflect some such understanding. That, in part, is what is meant by prayer. *Infra* Part II.C.

In a similar vein, the court below found it "worthy of weight" that those praying "appeared to speak on behalf of the town and its residents"—sometimes requesting audience participation or speaking "in the

first-person plural"—and that "members of the Town Council participated in the prayers, by bowing their heads, saying 'Amen,' or making the sign of the Cross." Pet. App. 23a. But Senate Chaplains likewise pray in such terms. *E.g.*, 146 Cong. Rec. 3005 (2000) (guest chaplain Roger Kaffer) ("Let us pray * * * [i]n the name of the Father and of the Son and of the Holy Spirit."); 96 Cong. Rec. 286 (1950) (guest chaplain Alvin Murray) ("In Christ's name we pray."); 33 Cong. Rec. 1 (1900) (Chaplain Milburn) ("We humbly ask, through Jesus Christ our Saviour."); Cong. Globe, 28th Cong., 2d Sess. 72 (1845) (Chaplain Tustin) ("humbly beg[ging]" for "the forgiveness of all our sins, personal and national"). And *amici* can attest that many senators likewise choose to "bow their heads" in respect, "make the sign of the Cross," or "say 'Amen.'"

The Second Circuit next deemed it troubling that the neutrality of the Town's selection process was undermined by its "practice of inviting clergy almost exclusively from places of worship located within the town's borders." Pet. App. 19a. But the Senate's chaplains and guests are likewise drawn from houses of worship within the Nation's borders. Nor is this a departure from religious neutrality. It is a *geographic* limitation.

Not content to denounce what the Town of Greece actually did, the court below also seized upon what the Town purportedly failed to do: "explain that it intended the prayers to solemnize Board meetings, rather than to affiliate the town with any particular creed," or that "the prayers were not to be used for proselytizing or disparaging other faiths." Pet. App. 22a. But legislative prayers are by definition intended to solemnize, and these *amici*'s experience con-

firms that, even without a formal prohibition, citizens can be expected to avoid using the opportunity to pray as a platform to convert or to disparage.

The court below further criticized the Town for "neither publicly solicit[ing] volunteers to deliver invocations nor inform[ing] members of the general public that volunteers would be considered or accepted, let alone welcomed, regardless of their religious beliefs or non-beliefs." Pet. App. 20a. The same critique, however, could be leveled against the Senate, whose members nominate as guest chaplains those adhering to a wide variety of faiths—yet without extending any invitation to the general public or adopting any formal policy of "nondiscrimination."

The final factor cited by the court below—the fact that the town "thanked" those who prayed "for being 'chaplain of the month'" (Pet. App. 23a)—is frankly absurd. The same criticism would apply to the Senate, which has always thanked its guest chaplains. *E.g.*, 159 Cong. Rec. S3791 (daily ed. May 23, 2013) (statement of Sen. Chris Coons); 159 Cong. Rec. S881 (daily ed. Feb. 27, 2013) (statement of Sen. Michael Crapo); see also 158 Cong. Rec. S1559 (daily ed. Mar. 12, 2012) (statement of Sen. Harry Reid) (thanking Chaplain Black). This practice dates to the Continental Congress, which voted to thank Jacob Duché "for performing divine Service, and for the excellent prayer." Annotation, 1 J. Continental Cong. 27 (Sept. 7, 1774). And, as noted, the Court in *Marsh* approved of Duché's prayer.

In sum, a review of the factors cited by the court below confirms that they do not—even in their "totality"—distinguish the Town of Greece's practice from the very "unbroken practice" that this Court relied

upon in sustaining legislative prayer in *Marsh*. From the Founding until today, the only significant limitations on legislative prayers in Congress have been those imposed by conscience and the good will of those praying. Since many, though not all, of those praying identify themselves as Christians, many of their prayers have invoked the name of Jesus or used other Christian language. But so long as others are likewise free to pray on their own terms, this practice does not establish religion.

II. Distinguishing "nonsectarian" from "sectarian" prayer would entangle the courts in theological matters that the First Amendment bars them from addressing.

Quite apart from *Marsh*'s historical analysis, having to draw lines between different prayers would entangle the courts (and those enforcing their orders) in controversial theological matters that the First Amendment bars them from addressing. This difficulty with the decision below provides an independent ground for permitting those offering legislative prayer to pray according to their own convictions.

The court below acknowledged that "the line between sectarian and nonsectarian prayers" presents "sizeable doctrinal problems," but brushed off this difficulty based on its misreading of *Marsh*. Pet. App. 15a. In reality, it is the decision below that conflicts with *Marsh*'s admonition that courts should not "embark on a sensitive evaluation or * * * parse the content of a particular prayer" (463 U.S. at 795)—an admonition rooted in several lines of precedent.

A. Distinguishing between "sectarian" and "nonsectarian" prayer necessarily entails making theological judgments.

We begin by emphasizing that any line between "sectarian" and "nonsectarian" prayer is necessarily a *doctrinal* line. And administering that line requires courts both to interpret different faiths and to make debatable judgments about which aspects of those faiths are most vital to their adherents.

The Second Circuit's ruling only confirms this. Although the court disclaimed any "sensitive evaluation" of prayer, it ultimately was compelled to comb the facts for "uniquely Christian references" and "references unique to some other faith." Pet. App. 20a. That is, the sectarian-nonsectarian line employed by the court compelled it to ask which faiths the prayers reflected, and which references were "unique" to that faith (which in turn required discerning what *other* faiths believe).

The Second Circuit purported to draw these lines from the vantage point of "an objective, reasonable person," insisting that it "need not determine whether any single prayer" gives "an indication of establishment," because there was "a steady drumbeat" of "sectarian" prayers. Pet. App. 21a, 22a. But such disclaimers cannot disguise the fact that determining whether prayer is sufficiently inclusive requires delving into matters of comparative theology—a constitutionally prohibited analysis.

B. Several lines of this Court's precedent forbid courts from analyzing whether prayer is "nonsectarian."

Numerous decisions of this Court prohibit courts from resolving doctrinal matters or analyzing the importance of particular tenets to any religion.

1. Church autonomy precedents

In *Presbyterian Church* v. *Hull Church*, 393 U.S. 440, 444 n.3 (1969), for example, the Court held that church property disputes could not be resolved under a "departure from doctrine" approach that turned on whether the denomination had "substantially abandoned" its core tenets. Such an approach required courts to interpret "the meaning of church doctrines," to "decide that a substantial departure has occurred," and "to determine whether the issue on which the general church has departed holds a place of * * * importance in the traditional theology." *Id.* at 450. But "assessing the relative significance to the religion of the [abandoned] tenets * * * requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion." *Ibid.* "If civil courts undertake to resolve such controversies," "the hazards are ever present of inhibiting the free development of religious doctrine." *Id.* at 449. Thus, "the First Amendment forbids civil courts from playing such a role." *Ibid.*

So too here. Determining whether prayer is "sectarian" entails determining both the doctrinal meaning of the prayer and whether that meaning differs meaningfully from others' beliefs (which, again, requires ascertaining their beliefs). Any such approach would inhibit praying in accordance with conscience

and create powerful incentives to conform to the government-imposed orthodoxy. Accord *Jones* v. *Wolf*, 443 U.S. 595, 604 (1979); *Serbian Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 713 (1976). This Court should not read *Marsh* to create such difficulties.

2. Free exercise precedents

Similarly, this Court's free exercise decisions recognize that civil courts are jurisdictionally prohibited from comparing different faiths. A leading example is *Thomas* v. *Review Board*, 450 U.S. 707 (1981), which arose when Indiana denied unemployment compensation to a Jehovah's Witness who turned down work building military equipment because his faith prohibited him from building weapons. Indiana argued that such work was consistent with his faith, citing testimony from another Jehovah's Witness, who believed "such work was 'scripturally' acceptable." *Id.* at 715. The Indiana courts agreed, but this Court reversed, explaining that "[c]ourts are not arbiters of scriptural interpretation" and that "the judicial process is singularly ill equipped to resolve [intrafaith] differences." *Id.* at 715, 716.

In purporting to identify "uniquely Christian references" and prayers framed in terms "to the clear exclusion of other faiths" (Pet. App. 20a, 21a), the court below implicitly deemed itself competent to resolve "intrafaith differences." To deem prayer "nonsectarian," courts must conclude that it reflects the "common faith" of a broad class of adherents—that it appeals to the lowest common religious denominator. Further, weighing the importance of religious differences to people of different faiths is akin to judging the "centrality" of a religious belief to a broader religious tradition. Cases such as *Thomas* emphatically

stress that such analysis "is not within the judicial function." 450 U.S. at 716; accord *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989).

3. School prayer precedents

The Second Circuit's approach also contravenes this Court's school prayer decisions, which hold that public school officials may not regulate the content of prayers. *E.g.*, *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Lee* v. *Weisman*, 505 U.S. 577 (1992). These cases do not invalidate legislative prayer. As *Marsh* confirms, public schools raise particular Establishment Clause concerns absent in legislative settings. 463 U.S. at 792 (legislative prayer involves "adult[s], [who] presumably [are] not readily susceptible to 'religious indoctrination'"); accord *Weisman*, 505 U.S. at 596-597.

At the same time, the Second Circuit's decision flouts an important *rationale* for these school prayer cases—namely, that public officials (including judges) are "without power to prescribe by law any particular form of prayer." *Engel*, 370 U.S. at 430. As *Engel* put it, the Framers—the same officials who viewed legislative prayer as consistent with the Establishment Clause—recognized that "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer." *Id.* at 429; see also *Weisman*, 505 U.S. at 589 (prayer is "too precious to be either proscribed or prescribed by the State"); cf. *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality) (analyzing whether institutions are "pervasively sectarian" involves a problematic "inquiry into the recipient's religious views").

Thus, just as *Marsh* settled the constitutionality of legislative prayer, *Engel* and *Weisman* establish

that judges may not regulate the content of prayers that *are* permitted. Indeed, citing *Engel* and *Weisman*, the Department of Education has stated that "where students are entitled to pray, public schools may not restrict or censor their prayers on the ground that they might be deemed 'too religious' to others. The Establishment Clause prohibits state officials from making judgments about what constitutes an appropriate prayer, and from favoring or disfavoring certain types of prayers—be they 'nonsectarian' and 'nonproselytizing' or the opposite—over others." U.S. Department of Education, *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645 (Feb. 28, 2003); see 20 U.S.C. §7904(b).

The Second Circuit thus erred in reading *Marsh* to forbid offering what it deemed "sectarian" invocations at municipal board meetings. Indeed, requiring that prayers reflect judges' preconceived notions of the appropriate amount of religious diversity is a grave departure from the religious neutrality required by the Establishment Clause.

4. Free speech precedents

Finally, the Second Circuit's decision runs afoul of the Free Speech Clause and the command of viewpoint neutrality. Even in administering a nonpublic forum for "official business," the government may not discriminate based on viewpoint, including religious viewpoint. See *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46-49 (1983); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). Further, the Court's free speech precedents teach that "inquir[ing] into the significance of words and practices to different religious

faiths" unconstitutionally "entangle[s] the State with religion." *Widmar* v. *Vincent*, 454 U.S. 263, 269 n.6 (1981).

Under the Second Circuit's ruling, however, those who believe that prayer should address particular deities are barred from praying, while those who believe that the deity may be addressed in generic terms may pray. This is precisely the sort of viewpoint-based discrimination and government-imposed orthodoxy that the First Amendment was designed to prohibit.

C. Enforcing a "sectarian"-"nonsectarian" distinction is also highly unworkable and incapable of neutral administration.

Enforcing a "sectarian"-"nonsectarian" line in anything like a neutral manner is also highly unworkable, if not impossible. Indeed, the Second Circuit's own examples reveal the futility of trying.

The court characterized a "third of the prayers" as speaking in "generically theistic terms," citing as examples a Christian minister's invocation of "Heavenly Father" and a Wiccan priestess's invocation of "Athena and Apollo." Pet. App. 7a. But the notion that these examples are "generally theistic" is at best debatable. Appeals to "Athena and Apollo" imply a Greek polytheism rejected by monotheistic faiths. And appeals to God as "Father" reflect a personal, and possibly trinitarian, conception of God.

Among those who identify themselves as Christian, there are substantial differences of opinion on the nature of the Trinity. Many liberal Protestants would not describe the Trinity as "Father, Son, and Holy Spirit." Instead, citing scriptures such as *John* 4:24 (KJV), they would argue that "God is a Spirit," and describe the triune God in gender-neutral terms,

such as "Creator, Savior, and Spirit." Cf. Karen Armstrong, *A History of God: The 4,000-Year Quest of Judaism, Christianity and Islam* 382-383 (1993).

By contrast, many Catholics and Protestants would decline to use gender-neutral terms to address God. Such an understanding of God would be inconsistent with their understanding of the Bible and church tradition. Cf. Paul Johnson, *The Quest for God: A Personal Pilgrimage* 48-49 (1996). And this is to say nothing of the views of sects such as Christian Scientists, which understand the divine in a purely impersonal, metaphysical sense. See Mary Baker Eddy, *Science and Health with Key to the Scriptures* 331 (2000 ed.). Given such deep-seated religious differences, the Second Circuit's decree that a gender-specific reference to God as "Father" is "generally theistic" is uninformed and incorrect.

The same is true of other names for the divine, such as "Elohim" or "Allah," which some consider generic but others deem sect-specific. For example, one leading authority states that "[m]ost often [*Elohim*] is a plural of majesty for Israel's 'God'" (*Harper Collins Bible Dictionary* 737 (rev. ed. 1996), and another states that "the widespread usage in Hebrew of this plural form * * * was almost certainly encouraged by the belief in the Israelite God as the only one of significance in Israel and therefore as the sum and total of all deity" (*Dictionary of the Bible* 334 (rev. ed. 1963)). Thus, some may view use of *Elohim* as "sectarian."

Similarly, some Muslims view the term "Allah" as a generic term for God, while others believe "Allah" to be "the proper name of God" as it is "a unique noun in Arabic" with "no female counterpart" and "no plural

form."[9] Thus understood, use of the word "Allah" might well "exclude" those who do not share a Muslim conception of God—or even be viewed as discriminating among Muslim conceptions of the divine.

In short, theological distinctions are not amenable to evaluation under an "objective, reasonable person" test borrowed from the world of torts. And differences among faiths are not only subtle and complex, but far beyond civil courts' authority to administer. The constitutional way to respect people of all faiths is to let everyone pray in accordance with conscience and in the language of their own religion.

III. Judicial inquiry into the content of legislative prayers would unduly interfere with the internal workings of a co-equal branch of government.

As we have shown, *Marsh* cannot be read to hold that "nonsectarian" prayer is constitutional and "sectarian" prayer is unconstitutional. Furthermore, the judicial oversight needed to administer the Second Circuit's approach would be both unworkable and an affront to the internal workings of a co-equal branch of government.

In cases such as this, the Court "must have 'due regard to the fact that [it] is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.'" *Rostker*, 453 U.S. at 64 (citation omitted). Deference to legislative judgments is especially ap-

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[9] *Three Faiths, One God: A Jewish, Christian, Muslim Encounter* 68 (John Hick & Edmund S. Meltzer, eds., 1989).

propriate when matters concern the legislature's internal workings, when there is no principled basis for adjudication, or when the legislature has "specifically considered the question of * * * constitutionality." *Ibid.* All of these factors—together with principles of federalism—warrant sustaining the prayer practice here. See *Marsh*, 463 U.S. at 790-791.

A. The constitutionality of legislative prayer has been considered by Congress, whose practice was dispositive in *Marsh*.

To begin with, the constitutionality of legislative prayer has been considered by Congress, whose practice was central in *Marsh*—and States and localities are no less entitled to engage in the same practices.

In the 1850s, the Senate received numerous petitions seeking "to abolish the office of chaplain" and, along with it, the practice of prayer. S. Rep. No. 32-376, 1 (1853). The Senate acknowledged that, if the practices at issue "violate either the letter or the spirit of the constitutional prohibition, * * * they should at once be repealed." *Ibid.* But the Senate recognized that these practices did not violate the Establishment Clause. *Id.* at 2-4; S. Journal, 32d Cong., 2d sess. (Jan. 19, 1853), 114; S. Rep. No. 32-376 (1853); accord H.R. Rep. No. 33-124 (1854); H.R. Rep. No. 31-171 (1850). A Senate Judiciary Committee report found "no doubt" about this conclusion. S. Rep. No. 32-376 at 4.

For example, the report deemed it significant that the "range of selection" of chaplains was "absolutely free in each house amongst all existing professions of religious faith." *Id.* at 2. "[N]o religion, no form of faith, no denomination" was given any "preference." *Ibid.* Members were not "compelled" to attend the

prayers, nor did any member "gain[] any advantage," "incur[] any penalty," or "lose[] any advantage by declining to attend." *Ibid.* The chaplain did not "owe[] his place" to his "holding a particular faith." *Ibid.* And while chaplains "[were] always [selected] from some one of the [Christian] denominations," this was "not in consequence of any legal right or privilege, but by the voluntary choice of those who have the power of appointment" and "the fact that almost our entire population belong to or sympathize with some one of the Christian denominations." *Id.* at 3.

The "strongest reason" supporting the practice's constitutionality, however, was that "from the beginning, our government has had chaplains in its employment" and that the same Congress that established the chaplaincies drafted the First Amendment. *Id.* at 4. The Founders "were true lovers of liberty," "utterly opposed any restraint upon the rights of conscience," and "did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators." *Ibid.* Thus, the challenged practices did not "invad[e] religious liberty in the widest sense of the term." *Id.* at 2.

That conclusion is entitled to deference, even in a case involving a town's practice of legislative prayer. *Marsh* mentioned the Senate Report in a footnote, without explaining its doctrinal significance. *Id.* at 787 n.10. But the report's content provides additional support for *Marsh*'s holding. And it would be "incongruous" to "impos[e] more stringent First Amendment limits" on state and local legislatures than are imposed upon Congress. *Id.* at 790-791.

B. The practice of legislative prayer is supported by constitutional provisions that commit the appointment of officers and the creation of internal rules to the legislative branch.

Deference to the practice of unhindered legislative prayer is also warranted in light of "textually demonstrable constitutional commitment[s] of the issue to a coordinate political department." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

The Constitution textually commits to Congress the exclusive authority to choose its officers (U.S. Const. art. I, §3, cl. 5), and to determine the rules of its proceedings (*id.* art. I, §5, cl. 2). When the First Congress convened, the Senate's first order of business was to determine its rules and choose its officers. It promptly appointed the first Senate chaplain. 1 Annals of Cong. 24 (Joseph Gales, ed. 1789). By Senate rule, the chaplain's prayer immediately follows the Presiding Officer taking the chair and immediately precedes the recitation of the Pledge of Allegiance. S. Standing Rule IV.1(a) (2000). The internal practices of Congress merit deference, and similar deference should be accorded to the internal practices of state and local legislatures.

C. There are no judicially manageable standards for adjudicating the permissibility of legislative prayer.

Deference to legislative prayer is also supported by "the lack of satisfactory criteria for a judicial determination" of what constitutes sufficiently inclusive prayer. See *Baker*, 369 U.S. at 210 (citation omitted). The court below made little effort to conceal this, admitting it could offer only "limited guidance" about

what a permissible prayer practice would look like. Pet. App. 24a. Even "municipalities with the best of motives may still have trouble," the court reasoned, because "even a single circumstance may appear to suggest an affiliation" and the Constitution requires a "delicate balancing act." Pet. App. 26a, 27a, 25a.

With due respect to the Second Circuit, the "appearance" of a "suggestion" of an "affiliation" is not a sound constitutional basis for interfering with the internal workings of a legislature. "The Establishment Clause, as the name suggests, forbids only the establishment of religion, not the mere appearance of doing so." *Kreisner* v. *City of San Diego*, 1 F.3d 883, 899 (9th Cir. 1993) (Kozinski, J., concurring). And identifying "sectarian" legislative prayers is beyond the realm of manageable *legal* standards.

As Justice Souter observed, no "subject [is] less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible," than "comparative theology." *Weisman*, 505 U.S. at 617-618 (Souter, J., concurring); see also *Pelphrey* v. *Cobb County*, 547 F.3d 1263, 1267 (11th Cir. 2008) ("Whether invocations of 'Lord of Lords' or 'God of Abraham, Isaac, and Mohammed' are 'sectarian' is best left to theologians"). Indeed, the Second Circuit all but conceded this in abjuring any principled test in favor of its own "judgment" about "the totality of the circumstances." Pet. App. 18a, 19a.

Absent clear, workable standards for governing legislators' conduct, judicial interference with the internal workings of state legislatures is unjustified. And "[c]ourts are particularly likely to defer to the judgments of representative bodies when there are no judicially manageable standards for decisionmaking."

See Michael W. McConnell, *Institutions and Interpretations: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153, 186 (1998). That is the case here.

* * * * *

In this religiously diverse Nation, the best means of ensuring that the government does not prefer any particular religious view in the context of legislative prayer is not to silence some such prayers while allowing others. It is to allow those who pray to do so in accordance with the dictates of their consciences.

As *Marsh* confirms, this approach respects 230 years of "unbroken practice * * * in the National Congress," and the Framers' view that the practice poses "no real threat" of establishing religion. 463 U.S. at 795. This approach also heeds *Marsh*'s admonition that the state ought not "parse * * * particular prayer[s]." *Ibid.* And it ensures that legislative prayers will not become a uniform state-imposed litany, but rather will reflect varied and vibrant expressions of faith from the Nation's many citizens.

In sum, allowing those who offer legislative prayers to pray in accordance with their own consciences is the approach that best serves the value of religious liberty that underlies the First Amendment.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 12-696

In The Supreme Court of the United States

TOWN OF GREECE, NEW YORK,

Petitioner,

v.

SUSAN GALLOWAY, *ET AL.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court and the Courts of Appeal on numerous occasions over its 30 year history, including in recent years serving as counsel of record in the legislative prayer case of *Turner v. City Council of the City of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008). One of the purposes of The Rutherford Institute is to advance the preservation of the most basic freedoms our nation affords its citizens—in this case, the constitutional right of citizens to engage in free speech in offering prayers at public meetings and freedom from governmentally imposed belief systems and establishments of religion.

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[1] No counsel for either party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have filed letters with this Court consenting to the filing of this brief.

STATEMENT OF FACTS[2]

Amicus incorporates by reference the statement of facts set forth in the merits Brief of the Petitioner, but highlights the following *specific facts* that are highly relevant to the Court's resolution of this case.

Since 1999, the Town Board of Greece, New York, has invited community clergy and others to offer invocations at the beginning of each meeting[3] in order to solemnize the occasion.[4] The Board has never adopted any formal guidelines as to the content of prayers, nor has it ever required or requested invited clergy to limit themselves to any particular prayer format (including any requirement that prayers be inclusive or ecumenical).[5] However,

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[2] Except as otherwise identified, the citations in the Statement of Facts are to pages in the Special Appendix and the Joint Appendix filed by the parties in the Second Circuit Court of Appeals. Such citations are identified by the abbreviation "S.A." or "J.A." followed by the page number from the Special Appendix or the Joint Appendix.

[3] The Town Board meets on the third Tuesday of every month in the Eastman Room of the Greece Town Hall (S.A. 6; J.A. A29). Meetings are open to the public and are broadcast on the local cable television station (J.A. A85).

[4] The practice of inviting clergy to pray replaced the Board's previous practice of opening meetings with a moment of silent prayer (S.A. 6-7).

[5] S.A. 7.

the Board did publish a clear and concise statement of its prayer policy in a June 20, 2007, letter from Town Supervisor John T. Auberger to the Respondents' counsel (Sup. Ct. Joint Appendix at 24A-25A):

> As you know, the Greece Town Board opens its meetings with a prayer from a Greece clergy member seeking divine guidance in the decisions the board makes. We do not request our invited clergy to advance any particular faith or denomination. The Town does not control the content of the prayers given, nor does it place restrictions or guidelines on these prayers. The board believes such control would inhibit religious freedom and fr edom of speech, both rights protected by the constitution.
>
> We invite Greece clergy from a list provided in the Greece Post on a rotating basis. While it has never been requested, if someone from a faith not listed in the Greece Post requested a prayer led by someone of their faith, we would make an effort to accommodate that request.
>
> It is therefore the Town's position that we are not advancing any religion or giving preference to any one faith over another. Accordingly, it is our intent to continue our current practice.

This succinct statement of Board policy is borne out in practice by the testimony of the multiple Town employees working in the Office of Constituent Services who were responsible for implementation of the policy over many years. Employees Linda Sofia, Geraldine Wagoner, and Michele Fiannaca all testified in depositions that they used the "Town Board Chaplains" list,[6] and sometimes a local Community Guide, to find persons who might offer a prayer. (J.A. A838). Each of the

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[6] Since 1999, Sofia, Wagoner, and Fiannaca maintained the list of possible prayer-givers and scheduled individuals to deliver the prayers. (S. A. 8-14)). The list was compiled by the employees over time from the local Yellow Pages, the *Greece Post's* "Religious Service Directory," and the local Community Guide (J.A. A90). In 2003, Employee Linda Sofia prepared a document entitled "Town Board Chaplains" which included the names of people who had agreed to give a prayer at Town Board meetings. (J.A. A834-835). Ms. Fiannaca compiled a document that included all the names of churches, synagogues, places of worship, and people who had expressed interest in giving a prayer. Most of the religious congregations in the Town are primarily Christian, but there is one Buddhist temple in the Town and several Jewish synagogues located just outside the Town (S.A. 18-19). The document was not exclusive, as Ms. Fiannaca added to the list anytime someone indicated a desire to give a prayer. Additionally, Ms. Fiannaca attested that if she learned of a new church in Town or a church that was not on the list, she would add it to the list. Further, if anyone asked to be removed from the list, she would remove them. Finally, if anyone specifically asked to give a prayer, she would put them on the next available slot (J.A. A829; S.A. 14-17, 43-44).

employees randomly called people on the list to find prayer-givers. (J.A. A826, A828, A829, A834, A839). No one ever intentionally neglected to call a specific church, (J.A. A834, A839) or rejected anyone from giving a prayer. The employees confirmed that no one ever told them to reject someone as a prayer-giver, or to remove someone from the list, or how or to whom a prayer-giver should pray. (J.A. A830, A835, A839).

The Respondents met with Town Deputy Supervisor Jeffrey L. McCann and Director Constituent Services Kathryn Firkins on September 27, 2007, and asked if an atheist could give a prayer, at which point they were told that they could in fact give the invocation. (S.A. 19). However, they never requested to be placed on the list of potential prayer-givers. In this meeting, the Town Board representatives also told them that anybody could request to deliver the prayer, that the Town had never before rejected a request, and that it did not review or censor prayer language.[7] Further, in

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[7] S.A. 7, 15, 41. In January 2008, Dave Chikowsky, a person of Jewish faith, asked and was given permission to give a prayer (Supreme Court Joint Appendix at 109A-110A). In April 2008, Jennifer Zarpentine, a Wiccan priestess, asked and was given permission to give the prayer (Supreme Court Joint Appendix at 112A). Chikowsky delivered the prayer again in July 2008 (Supreme Court Joint Appendix at 114A-115A), and a person from the local Baha'i congregation delivered the prayer in December 2008 (J.A. A91). The Town explicitly invited the lay Jewish man and the Wiccan priestess after receiving inquiries from them about delivering the prayer, and also invited the Baha'i representative to do so as well. (J.A. A829, A907; S.A. 47).

response to their complaints, Respondents were informed that the prayer practice would continue and that the Town would not control the content of prayers by requiring them to be nonsectarian. (S.A. 3, 7, 19, 47).

SUMMARY OF ARGUMENT

The Court of Appeals suggests that the central inquiry in this case is whether a hypothetical, reasonable observer "would *believe* that the town's prayer practice had the *effect* of affiliating the town with Christianity"[8] taking into account "the interaction of the facts"[9] in the case. The Court of Appeals' approach is problematic for several reasons.

First, it departs from the time-honored historical analysis of *Marsh v. Chambers*, 463 U.S. 783 (1983), and its recognition of limited judicial review of legislative prayer. *See Rubin v. City of Lancaster*, 710 F.3d 1087 (9th Cir. 2013).

Second, the Court of Appeals' "contextual" analysis — based on the perceptions of the hypothetical "reasonable observer" — revives the repudiated "primary effects" test of *Lemon v. Kurtzman*, 403 U. S. 602 (1971), an analysis eschewed in *Marsh*.

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[8] 681 F.3d at 33 (emphasis added).

[9] *Id.*

Third, the Court of Appeals' admission that its decision provides little, if any, guidance for legislative bodies as to the limits of permissible legislative prayer[10] is an indictment of the paucity of its decisional framework and highlights the need to reaffirm the broad parameters of *Marsh*, subject to clarification that expression of sectarian sentiments in legislative prayer is not prohibited unless it transgresses the requisite boundaries of improper motivation, exploitation or proselytization, or disparagement of one faith over another. *Marsh v. Chambers*, 463 U.S. 783 (1983); *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004).

Finally, if even eminent jurists cannot agree on the outcomes of the so-called "delicate balancing" required to determine just what a hypothetical "reasonable observer" might "believe," how can legislative bodies be expected to successfully engage in such guesswork? The inherent vagueness of the "reasonable observer" approach, if upheld, will inexorably lead to only one safe harbor, namely, sanitizing legislative prayer of all sectarian content, thereby creating an intolerant regime of civil religion that is not permitted by the Establishment Clause.[11]

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[10] The Court stated: "It is true that contextual inquiries like this one can give only limited guidance to municipalities that wish to maintain a legislative prayer practice and still comply with the mandates of the Establishment Clause." 681 F.3d at 33.

[11] The unabashed goal of the Respondents and Americans United for Separation of Church and State in this case is to extirpate *all sectarian references* from legislative prayer, as they initially argued to the District Court in their motion for summary judgment:

As Justice Kennedy wrote in *Lee v. Weisman*, 505 U.S. 577, 588-90 (1992), while there may be some support for the proposition "that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not," the First Amendment "does not allow the government to undertake that task for itself. . . . . The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either *proscribed* or *prescribed* by the State" [12] (emphasis added).

> Only nonsectarian, broadly inclusive legislative prayers are constitutional. Those that use the terminology of, or are otherwise associated with, any particular faith or denomination, are not.

This absolutist position was later masked on appeal, with Respondents first conceding that various courts of appeals had indicated "some tolerance of the inclusion of sectarian references," but then arguing that no such tolerance exists "[w]hen the audience for the prayers includes both adults and children. . . .", which, of course, with Town Board meetings being broadcast on local cable television, would include adults and children. *Compare* Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, *Galloway v. Town of Greece,* Case No. 6:08-cv-06088, Docket Entry 32, January 1, 2008, at 8, *with* Brief of Plaintiffs-Appellants, *Galloway v. Town of Greece*, U. S. Court of Appeals for the Second Circuit, Case No. 10-3635, Docket Document No. 37, filed December 16, 2010, at 24, 26, 31.

[12] *Lee*, 505 U.S. at 589.

The history and governing tradition of this country recognizes its religious diversity, as well as principles of religious accommodation, but not governmental prescriptions of religious expression. For those reasons, the broad historical discretion afforded by *Marsh* for legislative bodies to formulate and implement legislative prayer policies, including those permitting sectarian content, should be affirmed, conditioned on there being no demonstrable improper motivation, exploitation or proselytization, or disparagement of one faith over another.

ARGUMENT

I. THE PRAYERS DELIVERED UNDER THE TOWN OF GREECE'S PRAYER POLICY COMPORT WITH THE STANDARDS ANNOUNCED BY THE U. S. SUPREME COURT IN *MARSH v. CHAMBERS*.

This Court in *Marsh v. Chambers*, 463 U.S. 783 (1983), stated unequivocally that:

> [t]he *content of the prayer* is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Id. at 794-795. Judicial review of the *content* of legislative prayer was thus predicated on "whether the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief" and whether the prayer selection policy arose from some "impermissible motive." *Id.* at 794-95 (emphasis added). Absent those two factual predicates, *Marsh* made clear that "*it is not for [courts] to embark on a sensitive evaluation or to parse the content of a particular prayer.*" *Marsh,* 463 U.S. at 794-795 (emphasis added).

The Second Circuit departed from the *Marsh* rubric by proceeding to parse the content of prayers notwithstanding the fact that the Court (1) ascribed "no religious animus to the town or its leaders," *Galloway v. Town of Greece*, 681 F.3d 20, 32 (2d Cir. 2012), and (2) found specifically that "[t]he prayers in the record were not offensive in the way identified as problematic in *Marsh*: they did not preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like." *Town of Greece*, 681 F.3d at 31-32. Notwithstanding these exculpatory facts, the Court launched ahead to breach *Marsh*'s prudential constraints and to announce that "[t]he town had an obligation to consider how its prayer practice would be perceived by those who attended Town Board meetings," *id.* at 32, and that "taking into account all of these contextual considerations in concert, ...[w]e conclude that an objective, reasonable person would believe that the town's prayer practice had the effect of affiliating the town with Christianity." *Id.* at 33.

The Ninth Circuit panel opinion in *Rubin v. City of Lancaster*, 710 F.3d 1087 (9th Cir. 2013), provides a complete and effective rebuttal to the decisional error in the *Town of Greece* decision. According proper deference to the historical and constitutional acceptance of legislative prayer, the Ninth Circuit determined that "the touchstone of the [*Marsh*] analysis should be whether the *government* has placed its imprimatur, deliberately or by implication, on any one faith or religion," *quoting Joyner v. Forsyth Cnty.*, 653 F.3d 341, 362 (4th Cir. 2011)(Niemeyer, J., dissenting). Moreover, it determined under *Marsh* that any question as to whether the government had intentionally affiliated itself with a particular sect does "not pivot on the practice's effect on the disapproving listener," but rather should focus specifically "on the *government's* actions." *Id.* at 1095-96 (emphasis added). Stressing the neutrality of the City of Lancaster's prayer policy and practice, and the fact that any sectarian input arose from the individual choices of prayer-givers and/or demographics, the Ninth Circuit rejected arguments that the City had intentionally affiliated the City with Christianity or lent the City's imprimatur to any sect or faith. *Id.* at 1099-1100.

The *Rubin* Court also noted that the "reasonable observer" analysis is derived directly from the "primary effects" test of *Lemon v. Kurtzman*, 403 U. S. 602 (1971), a test that was not invoked in *Marsh*. "Instead, the [Supreme] Court left *Lemon* on the shelf, upholding Nebraska's practice solely on the basis of original intent, tradition, and the absence of evidence suggesting a *state-led* effort to proselytize, advance, or disparage

any one religion." *Rubin*, 710 F.3d at 1097 (emphasis added).[13]

Wholly apart from the Second Circuit's defective decisional rubric, its admission that courts can provide only limited guidance to legislative bodies as to the constitutional boundaries for legislative prayer is equally disturbing.[14] The best advice the Court could offer the Town of Greece was for it to "ask itself whether what it does, *in context*, reasonably can be seen as endorsing a particular faith or creed over others. That is the *delicate balancing act* required by the Establishment Clause and its jurisprudence." *Town of Greece*, 681 F.3d at 33 (emphasis added). Given the innumerable viewpoints as to what the perceptions of an "*ordinary*, reasonable observer" might be in any particular "context" (*id.* at 629), and recognizing the failure of even eminent jurists to agree on outcomes based on the "delicate balancing" required to discern them --- with the default in most cases being the

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[13] The Second Circuit seems to treat the dicta from the plurality decision in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989) --- a Christmas creche case --- as having equal weight with the Court's opinion in *Marsh*. However, "[n]othing in *Allegheny* suggests that it supplants *Marsh* in the area of legislative prayer."*See Simpson v. Chesterfield County*, 404 F.3d 276, 281 n. 3 (4th Cir. 2005), *cert. denied*, 546 U.S. 947 (2005).

[14] The Court stated: "It is true that contextual inquiries like this one can give only limited guidance to municipalities that wish to maintain a legislative prayer practice and still comply with the mandates of the Establishment Clause." *Town of Greece*, 681 F.3d at 33.

equivalent of a "we know it when we see it" standard --- there is little likelihood that legislative bodies will succeed in drawing such fine lines. This is especially true taking into account the wide disparities in cultures, populations and geographies within the United States.

If allowed to stand, therefore, the Second Circuit decision places every legislative prayer policy at risk, leaving but one safe harbor, namely, the hermetic sealing of legislative prayer against any and all sectarian content, inexorably producing a *de facto*, Establishment of non-sectarian, American civil religion. The lower court's failure to provide clear standards in this regard is not only a further indictment of its decision, it amplifies the necessity of reaffirming the broad parameters of *Marsh*, subject to clarification that the expression of *sectarian* sentiments in legislative prayer is not prohibited unless it transgresses the requisite boundaries of improper motivation, intentional exploitation, proselytization, or disparagement of one faith over another. *Marsh v. Chambers*, 463 U.S. 783 (1983); *Wynne v. Town of Great Falls,* 376 F.3d 292 (4th Cir. 2004).

In the present case, the Town of Greece's adoption of an open legislative prayer policy properly adhered to constitutional standards. The Town invited persons from a neutral database of community religious leaders (drawn from the broadest possible sources) to deliver prayer at the start of its meetings on a rotating basis. It specifically did not in policy or practice seek to advance any particular faith or denomination, or to

regulate content, or to impose controls that "would inhibit religious freedom and freedom of speech," and it made efforts to accommodate requests to pray. The *governmental motivation* behind the program was aimed at providing a diverse and inclusive program of legislative prayer[15] and the policy was, therefore, neutral, and not intentionally exploitative, proselytizing, or disparaging of other faiths.[16]

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[15] This Court's precedents have upheld governmental programs that involve or serve persons with diverse backgrounds and/or messages or benefits that are the product of neutral governmental action and individual, privately-expressed choices, where no reasonable person would expect or understand the parties' views or actions or receipt of benefits to constitute government endorsement of any particular religion. *See, e.g., Zelman v. Simmons-Harris,* 536 U.S. 639 (2002); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens,* 496 U.S. 226 (1990); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen,* 463 U.S. 388 (1983); *Widmar v. Vincent,* 454 U.S. 263 (1981).

[16] Remarkably, the Second Circuit recognized that the Town's prayer policy aspirations were neutrally adopted and implemented. The Court stated: *"[I]t seems to us that a practice such as the one to which the town here apparently aspired*—one that is inclusive of multiple beliefs and makes clear, in public word and gesture, that the prayers offered are presented by a randomly chosen group of volunteers, who do not express an official town religion, and do not purport to speak on behalf of all the town's residents or to compel their assent to a particular belief—*is fully compatible with the First Amendment."* *Town of Greece*, 681 F.3d at 34. (Emphasis added).

In conclusion, the applicable standard in this case is not the "effects" test of *Lemon v. Kurtzman*, but whether the Town engaged in intentional official action that was the product of improper motivation, exploitation or proselytization, or disparagement of one faith over another. In that regard, the Second Circuit found that the Town's policy inviting individually-promulgated and expressed prayers from a broad cross-section of the community did not constitute any such intentional transgression. *See Town of Greece*, 681 F.3d 31-32.[17] Accordingly, the decision below must be reversed.

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[17] The Fourth Circuit's decision in *Wynne v. Town of Great Falls, supra*, is a paradigm of a municipality that intentionally exceeded the limitations imposed by *Marsh*. In *Wynne*, the District Court made explicit findings that "the Town Council insisted upon invoking the name 'Jesus Christ,' to the exclusion of deities associated with any other particular religious faith, at Town Council meetings in public prayers in which the Town's citizens participated." *Wynne*, 376 F.3d at 301.

II. THE *MARSH* DECISION SHOULD BE CLARIFIED TO ALLOW ALL TYPES OF LEGISLATIVE PRAYER, INCLUDING PRAYER WITH SECTARIAN REFERENCES, IN THE ABSENCE OF FINDINGS OF IMPROPER GOVERNMENTAL MOTIVATION, OR INTENTIONAL GOVERNMENTAL EXPLOITATION, PROSELYTIZATION OR DISPARAGEMENT OF ONE FAITH OVER ANOTHER.

If there is any one flaw in the *Marsh* decision, it is its failure to bridge all of its recited facts with the legal standards announced in the case. Thus, after *Marsh*, litigants in lower courts were successful in persuading judges to "cherry-pick" allegedly distinguishing facts from the decision to find that sectarian legislative prayers could not possibly be permitted under *Marsh* because *Marsh* recited that the Nebraska Unicameral Chaplain in the latter years of his tenure had removed previous prayer references to Jesus Christ.[18] The subsequent *dicta* from the plurality opinion in the *Allegheny* case made legislative prayer even more susceptible to court-approved non-sectarian, ecumenical prayer.[19] Thus, in the face of an equal protection challenge by a Wiccan seeking to render a legislative prayer, the Fourth Circuit offered what is perhaps the most

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[18] *See, e.g., Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1409 (6th Cir. 1987).

[19] *See, e.g., Hinrichs v. Bosma*, 440 F.3d 393, 399-400 (7th Cir. 2006).

pristine expression of judicial dogma extolling the virtues of *non-sectarian* legislative prayer:

> *Our civic faith* seeks guidance that is not the property of any sect. To ban all manifestations of this faith would needlessly transform and devitalize the very nature of our culture. When we gather as Americans, we do not abandon all expressions of religious faith. Instead, *our expressions evoke common and inclusive themes* and *forswear*, as Chesterfield has done, *the forbidding character of sectarian invocations.*

Simpson, 404 F.3d at 287 (emphasis added).[20]

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[20] In *Simpson*, the Chesterfield County Board amended its invitation letter to request that prayer-givers not use the name of Jesus Christ after its unrestricted content policy was challenged by the would-be Wiccan prayer-giver. *Id.*, 404 F.3d at 279, n.1. The Court reviewed the new policy, noting approvingly that "[c]lerics from multiple faiths and traditions have described divinity in wide and embracive terms — 'Lord God, our creator,' 'giver and sustainer of life,' 'the God of Abraham, Isaac and Jacob,' 'the God of Abraham, of Moses, Jesus, and Mohammad,' 'Heavenly Father,' 'Lord our Governor,' 'mighty God,' 'Lord of Lords, King of Kings, creator of planet Earth and the universe and our own creator.' Chesterfield's openness to this ecumenism is consonant with our character both as a nation of faith and as a country of free religious exercise and broad religious tolerance." *Id.* at 284.

This Court has recently reaffirmed a countervailing principle: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Agency for International Development et al. v. Alliance for Open Society International, Inc., et. al*, 133 S. Ct. 2321, 2332 (2013) (*quoting West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943)).[21] These concerns were recognized in *Lee v. Weisman*, 505 U.S. at 588, where this Court upheld a challenge to a high school graduation prayer policy provided to a rabbi (who was to offer the prayer) in a booklet titled "Guidelines for Civic Occasions" with the advice "that his prayers should be nonsectarian." The petitioner in *Lee* contended that *non-sectarian* prayer was necessary to avoid an Establishment Clause violation. Writing for the majority, Justice Kennedy stated that while there may be some

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[21] The Court likewise acknowledged that "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 61 (2006) (citing *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943), and *Wooley* v. *Maynard*, 430 U. S. 705, 717 (1977)). The Court further stated that "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 641 (1994); *see Knox* v. *Service Employees*, 132 S. Ct. 2277, 2288 (2012) ("The government may not . . . compel the endorsement of ideas that it approves.").

support for the proposition "that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not," the First Amendment "does not allow the government to undertake that task for itself."[22] The Court further declared that "[i]t is a cornerstone principle of our Establishment Clause jurisprudence that *it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government* .... The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Id.* at 588-90 (emphasis added). The Court further explained:

> We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. . . . If common ground can be defined with permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. *But though the First Amendment does not*

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[22] *Lee*, 505 U.S. at 589.

> *allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.*
>
> . . . . And these same precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. *The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.*

Id. at 588-90 (emphasis added and internal citations omitted).

The dangers of regulating the content of prayers --- including commands to pray only with non-sectarian content --- are, of course, inherently recognized in *Marsh*'s proscription against "parsing the content of prayers." Both the Second Circuit in this case, and the Ninth Circuit in the *Rubin* case, also recognized even more explicitly the dangers of *prescribing* non-sectarian prayer. For example, the *Town of Greece* Court stated:

> Under the First Amendment, the government may not establish a vague theism as a state religion any more than

> it may establish a specific creed. . . . Nor do we hold that any prayers offered in this context must be blandly "nonsectarian." A requirement that town officials censor the invocations offered. . . risks establishing a "civic religion" of its own.

Id. at 29, 34. The *Rubin* Court specifically agreed with these Second Circuit conclusions, but went further to identify a second concern:

> the very act of deciding—as a matter of constitutional law, no less—who counts as a "religious figure" or what amounts to a "sectarian reference" not only embroils judges in precisely those intrareligious controversies that the Constitution requires us to avoid, but also imposes on us a task that we are incompetent to perform.[23]

In light of these mandates (but subject to the proscriptions of *Marsh*), it is clear that the government may not itself prescribe prayer. It may invite private clergy to give the invocation. It may employ and pay a Presbyterian minister, as in *Marsh*. Or, as in this case, it can even leave the choice of prayer to citizens or participating elected

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[23] Justice Souter recognized likewise in *Lee v. Weisman*, that there is hardly "a subject less amenable to the competence of the federal judiciary [than comparative theology], or more deliberately to be avoided where possible." *Lee*, 505 U.S. at 616-17 (Souter, J., concurring).

officials in a prayer rotation who in their own words and in their individual capacities, pray as they see fit.

Notwithstanding these constraints on legislative prayer, however, misunderstandings as to the boundaries of governmental restraints on speech in more general public programs abound. For example, *individually* expressed prayers and speeches or performances at other government functions or on government property have led to repeated censorship when they have included *sectarian* sentiments (on grounds that the expression of sectarian viewpoints exceeds the limits of governmentally endorsed "civic faith"), whereas *non-sectarian* sentiments expressed at the same events conforming to the "civic faith" have been permitted.[24]

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[24] *See, e.g.*, *McComb v. Crehan*, 320 Fed. Appx. 507 (9th Cir. 2009) (holding that prevention of Valedictorian's speech that allegedly proselytized in mentioning Jesus Christ and scripture did not violate First Amendment or Free Exercise rights although Co-Valedictorian's speech about prayer, God, and faith in non-sectarian terms was permitted); *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009) (finding censorship of instrumental graduation performance of "Ave Marie" in program containing eight other instrumental music pieces did not violate Equal Protection); *Turner v. City Council of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008) (O'Connor, J. sitting by designation) (affirming that City Councilman's Free Exercise and First Amendment rights were not violated when Councilman mentioned Jesus Christ in opening legislative prayer while other Council members invoked Almighty Father, Gracious God and other references to Deities under non-denominational prayer policy), *cert denied*, 555 U.S. 1099 (2009); *Hinrichs v. Bosma*, 400

Obviously, in the context of legislative prayer, the Free Speech or Free Exercise rights of individual prayer-givers are more limited than such expression would be in a private forum or park, street or sidewalk. However, so long as an individually-given legislative prayer does not proselytize, or disparage one religion over another, or is not part of an intentional governmental program to advance such prohibited objectives, governmental coersion forcing individual speakers to render *non-sectarian* religious speech infringes on rights of conscience, inequitably advances state orthodoxy, silences diverse and disfavored viewpoints, and diminishes the vitality of free speech.[25]

F.Supp.2d 1103 (S.D. Ind. 2005) (holding that legislative prayer must be non-sectarian), *rev'd on other grounds*, 506 F.3d 584 (7th Cir. 2007); *Klingenschmidt v. Winter*, 275 Fed. Appx. 12 (D.C. Cir. 2007) (holding that Navy Chaplain's failure to follow Navy regulation limiting sectarian prayer did not violate First Amendment and was grounds for dismissal from service).

[25] Legislative prayer presented by private citizens intersects with individual rights granted under the Free Speech, Free Exercise and Establishment Clauses and is, therefore, a form of protected "hybrid speech," speech that is both private and governmental at the same time. *See, e.g., Sons of Confederate Veterans v. Comm'r of the Virginia Dep't of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2004) (Luttig, J., respecting the denial of rehearing *en banc*) ("[T]he particular speech at issue in this case is neither exclusively that of the private individual nor exclusively that of the government, but, rather, hybrid speech of both.").

Expressions of "civic religion" most evidently come to the surface at times of national crisis or tragedy. For example, the events of 9/11 precipitated numerous expressions of "civic faith." Likewise, during the Civil War, both sides equated serving country with serving God, and dying for country, dying for faith.[26] While it is understandable that citizens would draw deeply from common religious reservoirs when ways of life are threatened, or societal injustice and human costs are high, it is nevertheless true that no law, and indeed no decision of this Court or any other court ostensibly banning *sectarian* content from legislative prayer or religious speech at other official occasions would necessarily be recognized as legitimate or obeyed in practice. Conversely, a *de facto* or formal judicial declaration fostering a regime of legislative prayer or religious speech limited to *non-sectarian* precepts of God and country could very well serve to extinguish whatever virtues of accommodation and diversity of religious expression remain in the polity. It would also amplify the type of majoritarian intolerance that James Madison warned against in the Federalist Papers.[27] In the extreme, such an exclusively *non-sectarian* dogma could potentially feed fires of Nationalism or intolerance, when leaders, or a tyrannically fervent majority, co-opt and manipulate it to suppress potentially balancing *sectarian* sentiments that might otherwise challenge or undermine the advancement of questionable

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[26] HARRY S. STOUT, UPON THE ALTAR OF THE NATION: A MORAL HISTORY OF THE CIVIL WAR xviii (2006).

[27] THE FEDERALIST NO. 10 (James Madison).

political or social ends, as has often been the case in our country's history.

In sum, the balance struck in *Marsh* for legislative prayer was appropriate and should be reinforced in the Court's decision of this case by explicitly confirming that *sectarian* content in legislative prayers is permitted, so long as it does not run afoul of the other restrictive requirements set forth in the *Marsh* opinion.

CONCLUSION

The diverse history, tradition and disparate cultures within each of the United States, including their diverse religious traditions, plainly allow for, and even prudentially advise, broad discretion for local, state and national legislative bodies to formulate and implement their own unique legislative prayer policies and practices. The boundaries announced by *Marsh*, while fully appropriate and viable under the Establishment Clause, should nevertheless be clarified by expressly confirming that it is only the *intentional* advancement or hostility to religion *by concrete government action* that is proscribed in the context of legislative prayer and that sectarian content is permitted in the absence of improper motive or intentional proselytization or disparagement of other faiths.

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AMICUS CURIAE BRIEF

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In The

Supreme Court of the United States

Town of Greece,

Petitioner,

v.

Susan Galloway and Linda Stephens,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Brief for Seven Prayer-Givers as *Amici Curiae* in Support of Petitioner

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Interests of *Amici Curiae*[1]

Amici Curiae are private individuals living in or around the Town of Greece, New York (the "Town") that have given prayers before Town Board Meetings. *Amici* believe that their prayers are their own speech and are concerned about the effect this case will have on their First Amendment rights.

Dr. Robert Brado, the Associate Pastor of First Bible Baptist Church and Director of North Star Bible Institute in the Town of Greece, delivered the opening prayer at approximately four Board Meetings. Pastor Vince DiPaola, Senior Pastor at Lakeshore Community Church in Rochester, delivered the opening prayer at a Board Meeting on several occasions. Pastor Kirk Dueker, the Associate Pastor at Hope Lutheran Church in Rochester, delivered the opening prayer at a Board Meeting. Pastor George Grace, Pastor at First Bible Baptist Church in Rochester, delivered the opening prayer at a Board Meeting on several occasions. Pastor Nathan Miller, the Greece Campus Pastor at Northridge Church in Rochester, delivered the opening prayer at a Board Meeting. Rev. Anne O'Connor, Pastor of Aldersgate United Methodist Church in Rochester, delivered the opening prayer at a Board Meeting a few times. Pastor Larry Stojkovic,

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[1] Letters from the parties consenting to the filing of this brief are on file with the Clerk. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici curiae* and their counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

Senior Pastor at Hope Lutheran Church in Rochester, delivered the opening prayer at approximately three Board Meetings.

Summary of the Argument

The Establishment Clause only applies to government speech. Therefore, the legislative prayer policy of the Town of Greece ("the Town") implicates the Establishment Clause only if the prayers offered before the Town Board Meetings are government speech.

But speech by private citizens cannot be attributed to the government unless the government exercises sufficient control over the content. In this case, the Town does not control the content of the prayers or messages offered before the Town Board Meetings. Rather, the Town allows any individual to offer the prayer before the Board Meetings and does not review or censor any prayer. Thus, the Town's legislative prayer policy does not result in government speech but, instead, creates a limited public forum that is open to private individuals who desire to solemnize government proceedings with a prayer. The solemnization of government proceedings with prayer was affirmed as a legitimate purpose by this Court in *Marsh v. Chambers*, 463 U.S. 783 (1983).

While the *Marsh* court analyzed legislative prayer under the Establishment Clause, this practice must be considered under the Free Speech Clause because legislative prayer is private speech endorsing religion, not government speech. Such private speech is fully protected under the Free Speech Clause and the Free Exercise Clause.

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 841 (1995) (citing *Bd. of Educ. of the Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990)). Thus, this case is about the freedom of speech, not the establishment of religion.

Amici request that this Court reverse the Second Circuit Court of Appeals and hold that the Town's legislative prayer policy creates a legitimate limited public forum for private individuals to engage in private speech.

Argument

I. The Establishment Clause Does Not Apply to the Town's Legislative Prayer Policy.

The Establishment Clause of the First Amendment applies to only government speech, not to private speech. The speech at issue in this case is not government speech because it is not controlled by or attributable to the government. Rather, the prayers and messages given at the beginning of Board Meetings are the speech of *amici* and other private individuals. Therefore, the Establishment Clause is not implicated by this case.

A. The Establishment Clause Applies to Only Government Speech.

The Establishment Clause states that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Establishment Clause has been incorporated to state governments through the Fourteenth Amendment. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947). The purpose of the Clause is to prevent the government from establishing an official church. *Id.*

Yet not all government recognition of religion rises to the level of establishment. *See, e.g., Van Orden v. Perry*, 545 U.S. 677, 690 (2005) ("Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause"). Avoiding a violation of the Clause "does not require eradication of all religious symbols in the public realm." *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010). *See also County of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., dissenting) ("Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society").

In fact, the government must not, in an attempt to avoid violating the Establishment Clause, run afoul of the other First Amendment principles by discriminating against religious viewpoints when extending state benefits to private groups. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (school district preventing religious group from using a limited public forum is illicit viewpoint discrimination when similar, non-religious groups are allowed to use the forum); *Rosenberger*, 515 U.S. at 845-46 (university's refusal to reimburse costs for the printing of student religious newspaper was illicit viewpoint discrimination when the university reimbursed other student newspapers). Extending a benefit to religious groups based upon religion-neutral criteria does not offend the Establishment Clause's

guarantee of neutrality, but rather respects it. *Id.* at 839.

Similarly, in the legislative prayer context, this Court has held that solemnizing a legislative session with the invocation of divine guidance is not "an 'establishment' of religion or a step toward establishment." *Marsh*, 463 U.S. at 792. Rather, such a practice is simply the government's "tolerable acknowledgment of beliefs widely held among the people of this country." *Id.*

But the Establishment Clause is not even implicated unless there is government action. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) ("[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct."). Here, the Establishment Clause is not implicated as the speech in question is not government speech but is instead attributable to private individuals.

B. The Town's Legislative Prayer Policy Is Not Government Speech.

The courts below, narrowly focusing on whether the Town's policy violates the Establishment Clause, failed to consider the threshold question of whether the prayers given by *amici* and others were even government speech. Government speech is speech that is *controlled* by the government. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 561 (2005). As the undisputed record shows, the Town exerted no control over the speech at issue here. *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 197 (W.D.N.Y. 2010). Therefore, there is no government speech.

1. Government Speech Is Speech Controlled by the Government.

This Court provided guidance on determining whether speech is "government speech" in *Johanns*. There, two cattle associations challenged a mandatory congressional beef promotional program as compelled speech in violation of the First Amendment. 544 U.S at 555-6.

Central to the associations' challenge was their assertion that the promotional program was not government speech because the content was "effectively controlled by a nongovernmental entity," the Cattleman's Beef Promotion and Research Board. *Id.* at 560. Specifically, all "promotional campaigns are designed by the Beef Board's Operating Committee, only half of whose members are Beef Board members appointed by the Secretary [of Agriculture.]" *Id.*

This Court disagreed, finding that the speech was controlled by the government as Congress and the Secretary established, implemented, and approved the entirety of the promotional program. *Id.* at 561; *see also Pleasant Grove v. Summum*, 555 U.S. 460, 461 (2009) (finding government speech when "City 'effectively controlled' the messages . . . by exercising 'final approval authority'") (internal citations omitted). Therefore, "when . . . the government sets the overall message to be communicated and approves every word that is disseminated," the message is still government speech even if the government "solicits assistance from nongovernmental sources in developing specific messages." *Johanns*, 544 U.S. at 562.

Yet the district court and the Second Circuit failed to analyze the threshold question of whether the prayers offered as a result of the Town's policy are even government speech. Had the courts done so, they would have declined to reach the Establishment Clause analysis and dismissed Respondents' claims.

2. The Town Does Not Control the Prayers of *Amici* and Other Private Individuals.

The prayers given by *amici* and other private individuals are not government speech because the government did not control the message. Unlike the government program in *Johanns*, where a nongovernmental entity implemented the government's message, the messages of the prayers are controlled by, and therefore attributable only to, the private speakers. The Town merely created a forum for the speech of *amici* and other private individuals.

It is undisputed that "the Town has never set any guidelines concerning the content of prayers, and has never asked to review the wording of prayers." *Galloway*, 732 F. Supp. 2d at 197. Similarly, the Town has never censored a prayer or turned away anyone who wanted to pray. *Id.* In fact, all *amici* that offered prayers before Town meetings believed they were doing so on his or her own behalf and not on behalf of the Town.

Despite no evidence of governmental control and citing only the use of common vernacular such as "let 'us' pray" and "'we' ask," the Second Circuit asserted that *amici* and other private individuals "appeared to speak on behalf of the town and its residents,

rather than only on behalf of themselves." *Galloway v. Town of Greece*, 681 F. 3d 20, 32 (2d Cir. 2012).

But the evidence shows, and *amici* reassert, that the prayers given were the speech of private individuals. Each prayer was spoken based on the speaker's own convictions and not based on the Town's control.

The district court and Second Circuit erred in assuming that their analyses must begin with *Marsh* instead of considering whether the Establishment Clause is implicated at all. *Galloway*, 681 F. 3d at 26; *Galloway*, 732 F. Supp. 2d at 220. While *Marsh* and the current case deal with a similar subject—prayers held before a government body—the facts of the current case are distinguishable from *Marsh*.

In *Marsh*, the Nebraska Legislature hired a Presbyterian pastor to open each legislative session with a prayer. This pastor was paid with public funds, rehired for 16 consecutive terms, and consistently offered prayers in the Judeo-Christian tradition. *Marsh*, 463 U.S. at 793. This Court held that, because of the longstanding history and tradition of legislative prayer, the pastor's speech did not violate the Establishment Clause. *Id.* at 795.

Notably, in *Marsh*, this Court did not expressly discuss whether the speech was government speech. But the Court was presented with facts supporting the conclusion that the government selected the speaker and controlled the speech, a conclusion that cannot be reached in the present case.

For example, unlike the singular, paid pastor in *Marsh*, the Town allows any individual to offer the invocation (even those who are not religious) and it

does not pay any of the prayer-givers. *Compare Galloway*, 732 F. Supp. 2d at 197, with *Marsh*, 463 U.S. at 793. The Town's distinct lack of control over the message of the prayer-givers shows that the prayers were private speech, not government speech.

II. *Amici* and Other Private Individuals Spoke in a Limited Public Forum.

In addition to the government not controlling the speech, the speech of the various individuals before the Town Board meetings took place in the context of a limited public forum that is generally available to a class of speakers. Speech in a limited public forum is protected by the First Amendment.

A. The Government May Create Different Fora for Private Individual Speech.

This Court has recognized three types of fora. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). First, there is the traditional public forum, which may or may not be created by the government. These are areas "devoted to assembly and debate," *Perry Educ. Assn v. Perry Local Educators' Assn*, 460 U.S. 37, 45 (1983), which are "open for expressive activity regardless of the government's intent." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998). Typical examples of public fora include sidewalks and public parks. Speech in a public forum is not government speech and is fully protected by the First Amendment. The government may restrict speech in a public forum "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius*, 473 U.S. at 800.

Next, there is the limited public forum. These fora are established by purposeful government action to open nontraditional fora for expressive activity for a limited amount of time, *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981), or for a limited class of speakers, *Widmar v. Vincent*, 454 U.S. 263, 277 (1981), or for a limited number of topics, *City of Madison, Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175 (1976). The government may reserve a forum for certain classes of people and for the discussion of certain topics so as to confine that forum to the limited and legitimate purposes for which it was created. *Rosenberger*, 515 U.S. at 829. Speech in a limited public forum is also private speech that is fully protected by the First Amendment and restrictions on such speech must be viewpoint neutral and reasonable in light of the purpose of the forum. *Good News Club*, 533 U.S. at 106-07.

Finally, other government properties are either nonpublic fora or not fora at all. *Forbes*, 523 U.S. at 677. The government may restrict access to such fora so long as the restrictions are reasonable and not calculated to suppress expression of a particular viewpoint. *Id.* at 677-8. Because of the control exercised by the government, speech in nonpublic fora is considered government speech. *Chiu v. Plano Indep. Sch. Dist.*, 260 F. 3d 330, 347 (5th Cir. 2001). In nonpublic fora, First Amendment protections are lessened for the speaker, but the likelihood of a violation of the Establishment Clause is increased. *See Cornelius*, 473 U.S. at 800.

B. The Government May Create a Limited Public Forum for the Solemnization of Board Meetings.

The distinction between a limited public and a nonpublic forum primarily turns on whether the government has made the property "generally available" to a class of speakers. *Forbes*, 523 U.S. at 679. The government has not created a limited public forum when it merely allows selective access for individual speakers. *Id.* If speakers are required to obtain permission to use the forum or if the government makes non-ministerial judgments in its selection process, then the forum is considered nonpublic. *Cornelius*, 473 U.S. at 803-4. The more selective the government is in granting access, the more likely the forum will be considered nonpublic. *DeBoer v. Vill. of Oak Park*, 267 F. 3d 558, 566 (7th Cir. 2001). On the other hand, if the selection process is simply ministerial and the forum is open to all of a certain class and permits all speech on a certain topic, a limited public forum has been created. *Cornelius*, 473 U.S. at 804.

The government may set up limited public fora in a variety of legitimate contexts. For example, public hospitals and airports may have chapels. These areas are designated to afford individuals an opportunity to worship. They are not open to any public use, and the government may legitimately limit the use to comport with the purpose of the space. Beyond that, however, the government does not exercise control over who may use the space or over the speech itself, other than for ministerial purposes, such as scheduling. Just as these worship spaces are legitimate, so too may the Town

legitimately create a time and space designated for prayer by individuals to solemnize the Town's meetings.

C. The Town Created Such a Limited Public Forum.

Here, the Town set up a limited public forum for solemnizing meetings. The forum is not a traditional public forum, but is a limited opportunity for private individuals to offer an invocation before Town meetings to solemnize the weighty task of governance. This Court, acknowledging the perennial traditions of the nation, recognized the validity of such a purpose. *Marsh*, 463 U.S. at 792. The forum was, therefore, legitimately limited to the solemnizing messages. The government "may legally preserve the property under its control for the use to which it is dedicated." *Lamb's Chapel*, 508 U.S. at 390.

More importantly, the prayer time was not a nonpublic forum because the Town did not limit access based on non-ministerial judgment or require prayer-givers to obtain permission. *Galloway*, 732 F. Supp. 2d at 197. Anyone, of any or no religion, can come forward and offer to give a solemnizing message or prayer, and no one has ever been rejected. *Id.* The Town will accept any volunteer to deliver his or her message or prayer and would not regulate the content of the message or prayer. *Id.* The Town's "selection process" is purely ministerial and consisted of nothing more than compiling a list of all religious leaders in the Town and contacting them, without exclusion, to extend invitations to offer the message or prayer. *Id.* at 217. The

necessities of order and efficient operation of meetings justified lining up prayer-givers in advance to ensure that the Town was not obligated to wait for volunteers and that each meeting was opened with a solemnizing message or prayer.

Furthermore, the creation of a limited public forum for offering solemnizing messages or prayers before a town meeting does not itself establish religion. Such a result would be inconsistent with the precedent established in *Marsh*. If the hiring of a chaplain to offer prayer before government meetings does not violate the Establishment Clause, as was the case in *Marsh*, then creating a limited public forum open to all volunteers to speak as they wish cannot violate the Establishment Clause. In the former instance, the speaker and the content of the speech are controlled by the government, while in the latter, the government does not dictate who speaks or what they say.

Because the Town has created a forum designed for the purpose of solemnizing government meetings and because individuals are invited or may volunteer without exclusion to speak as they see fit, this Court should reverse the Second Circuit and find that this practice does not result in government speech, but private speech in a limited public forum, and, therefore, does not implicate Establishment Clause concerns at all.

III. The First Amendment Protects the Speech of *Amici* and Other Private Individuals.

The First Amendment states that "Congress shall make no law...abridging the freedom of speech." U.S. Const. amend. I. While the prayer-givers engaged in speech on government property, "the government does not have a free hand to regulate private speech on government property." *Summum*, 555 U.S. at 469. Where a government has created a limited public forum, such as an opening prayer before a town board meeting, restrictions on speech "must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest." *Id.*

Because the speech of *amici* and other prayer-givers is private speech within a limited public forum that does not implicate the Establishment Clause, it is protected speech under the Free Speech Clause of the First Amendment. As there is no compelling government justification restricting this speech, enforcing Respondents' requested injunction would violate the prayer-givers' First Amendment rights.

A. The Speech of *Amici* and Other Prayer-Givers Is Private Speech Protected Under the First Amendment.

In offering a prayer before a Town meeting, *amici* and other prayer-givers engaged in private speech within a limited public forum. As such, their speech is not subjected to the same requirements of government speech under the Establishment Clause.

As in *Johanns*, this Court analyzed the distinction between private speech and government

speech in *Summum*. There, a religious organization sought to build a permanent religious monument in a government-owned public park. Although the park in question already contained at least eleven other monuments, including one depicting the Ten Commandments, the city denied the organization's request, explaining that the city's practice was to only put monuments in the park that "either (1) directly relate to the history of [the city], or (2) were donated by groups with longstanding ties to [the city's] community." *Id.* at 465. This Court stated that "government entities are strictly limited in their ability to regulate private speech" in traditional, *id.* at 469, and limited public fora, *id.* at 470. However, because the monuments were permanent structures on government property, this Court held that the placement of monuments was a form of government speech rather than private speech and upheld the city's decision. *Id.* at 472. This Court further justified its finding of government speech by stating that "[i]t certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated." *Id.* at 471.

Unlike the religious group in *Summum*, the prayer-givers' speech here was not a permanent form of speech; their speech was only a temporary presence within a limited public forum. The Board "reserv[es the designated prayer time] for certain groups or for the discussion of certain topics" that include the prayers given. *Rosenberger*, 515 U.S. at 829. Because of its temporary nature, the private speech heard through the prayers given during the

Town Board meetings is set apart from government speech. The Town Board meetings have already been opened by numerous different prayer-givers, including *amici*, without interfering with the main work of the Town Board. Therefore, the prayers are private speech, made in a limited public forum, and any restrictions would be subject to strict scrutiny under the First Amendment. *See Summum*, 555 U.S at 469-70 ("Government restrictions on speech in a designated [or limited] public forum are subject to the same strict scrutiny as restrictions in a traditional public forum.").

B. Censorship of Sectarian Speech Violates the First Amendment Prohibition on Viewpoint Discrimination.

Because the speech of *amici* and other private individuals fits "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger*, 515 U.S. at 828 (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)); *see also Good News Club*, 533 U.S. at 106-07 ("The State's power to restrict speech...is not without limits. The restriction must not discriminate against speech on the basis of viewpoint."); *see also Cornelius*, 473 U.S. 788. Respondents seek to eliminate the use of "sectarian" language, which is intended to mean "prayers that invoke a particular religion or particulars of a particular religion." *Galloway*, 732 F. Supp. 2d at 204 (internal citations omitted). Limiting the prayers to only "nonsectarian" language as Respondents desire would be a form of viewpoint discrimination in violation of the prayer-givers' First Amendment rights.

Respondents define "sectarian" language to be language that is specific to one religion. *Galloway*, 732 F. Supp. 2d at 204. Specifically, Respondents assert that the words "Jesus" and "Holy Spirit" are unacceptable. *Id.* Forcing speakers to exclude sectarian language, including words like "Jesus," "Jesus Christ," "Allah," and "Holy Spirit," *id.*, would affect certain prayer-givers while leaving others unaffected; it would force many of the prayer-givers to change the content of their speech. Therefore, adopting Respondents' definition of sectarian language itself amounts to viewpoint discrimination that is prohibited under the First Amendment. For example, this restriction might censor much of a Christian prayer-giver's message while leaving a Bahá'í prayer-giver's message relatively uncensored. Such an example is demonstrated by a prayer given by Fr. Alex Bradshaw of Our Mother of Sorrows Church on March 15, 2005. A portion of his prayer, edited in an effort to placate Respondents' objections, would read as follows:

> Let us pray. Lord, ~~God of all creation~~, we give you thanks and praise for your ~~presence and action~~ in the world. We look with anticipation to the ~~celebration~~ of ~~Holy Week~~ and ~~Easter~~. It is in the solemn events of next week that we find the very ~~heart and center of our Christian faith~~. We ~~acknowledge~~ the ~~saving sacrifice of Jesus Christ on the cross~~. We draw strength, vitality, and confidence from ~~his resurrection~~ at ~~Easter~~. ~~Jesus Christ~~, ~~who took away the sins~~ of the world, ~~destroyed~~ our

> ~~death~~, through ~~his dying and in his rising~~, ~~he has restored~~ our ~~life~~. Blessed are you, ~~who has raised up the Lord Jesus~~, ~~you who will raise us~~, in our turn, and put us by ~~His~~ side. We pray for peace in the world . . . We pray also for the protection of our armed forces . . . May this season of the year, of ~~Good Friday~~, followed by the ~~joy~~ of ~~Easter~~, be a time of hope for the future. We acknowledge the role of the ~~Holy Spirit~~ in our lives . . . So we pray . . . for the ~~guidance of the Holy Spirit~~. . . . Bless this Town of Greece and all who live here. Praise and glory be yours O Lord, now and forever more. ~~Amen~~.

J.A. 88a-89a. Comparatively, a portion of Thomas Lynch, Chairman of the Local Spiritual Assembly of the Bahá'í Community of Greece's prayer, similarly edited, would read as follows:

> O thou kind Lord, this gathering is turning to Thee, these hearts are radiant with Thy love, these minds and spirits are exhilarated by the message of Thy glad tidings. O God, let this American democracy become glorious in spiritual degrees, even as it has aspired to material degrees, and render this just government victorious...O God, this American nation is worthy of Thy favors and is deserving of Thy mercy. Make it precious and near to Thee through Thy bounty and bestowal. ~~Alláh-u-Abhá~~.

> And also, O thou kind Lord, these are Thy servants who have gathered in this meeting, have turned onto Thy kingdom, and are in need of Thy bestowal and blessing. O thou God, manifest and make evident the signs of ~~Thy oneness~~ that have been deposited in all the realities of life...Free us from the fetters of material existence...O God, resuscitate ~~us~~ ...Every bestowal emanates from Thee, every benediction is Thine. Thou art mighty, Thou art powerful, Thou art the giver, and Thou art the ever bounteous. ~~Alláh u-Abhá.~~

J.A. 127a-128a. Censoring the use of sectarian language, which is more likely to be employed by certain faiths, creates more than an "'incidental effect'" on speech and would render such a restriction on speech beyond the point of viewpoint neutrality. *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 130 S. Ct. 2971, 2994 (2010) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Additionally, censorship of nonsectarian language is viewpoint discrimination because the restriction is related to the content of the message. In order for censorship of speech to stand, it must be content neutral, and only "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral." *Ward*, 491 U.S. at 792. In this instance, however, the goal of the restriction would be to eliminate content that would align a prayer with a particular religion. In regards to the prayer from Fr. Alex Bradshaw, the content and message

desired from his prayer would be greatly altered by Respondents' requested relief barring what they define as "sectarian" language. Because the content of the message is censored, the restriction against nonsectarian prayer is viewpoint discrimination in violation of the First Amendment.

The real aim of Respondents' requested relief appears to be to silence Judeo-Christian language, not all sectarian language. As Respondents point out, "Christian clergy members have delivered nearly all of the prayers relevant to this litigation." *Galloway*, 681 F. 3d at 23. But, notably, the "[r]eligious congregations in town are primarily Christian." *Id.* at 24. In fact, only four prayers were given by non-Christians during the time period in question, *id.* at 23, only one of which, conducted by a Jewish layperson in 2008, offended Respondents. *Galloway*, 732 F. Supp. 2d at 207. Although the respondents do say that other religious terms, such as "Allah" in relation to Islam, would be sectarian as well, no prayers were conducted by an Islamic clergyman. Therefore, Respondents purported injury is directly related to the expression of Judeo-Christian beliefs, the targeted censorship of which cannot be allowed under the First Amendment.

Conclusion

The Establishment Clause ensures religious neutrality in government speech and action; it does not eradicate all private religious speech and action in the public square. The Town shows respect for the free speech rights of its citizens when it creates a limited public forum for the solemnization of the Town's Board Meetings. By ruling that such creation

is impermissible, the Second Circuit impermissibly censored the free speech of private individuals. This Court should prevent this unconstitutional censorship from occurring and reverse the judgment of the Second Circuit below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

TOWN OF GREECE,
Petitioner,
v.
SUSAN GALLOWAY AND LINDA STEPHENS,
Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* STATE OF SOUTH CAROLINA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

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INTEREST OF *AMICUS CURIAE* STATE OF SOUTH CAROLINA

This case is of paramount importance to South Carolina and its citizens. It raises the permissible limits of legislative prayer under the Establishment Clause. That issue was thought settled by *Marsh v. Chambers*, 463 U.S. 783 (1983). Yet, the question inexplicably continues to confound circuit courts, including the Second Circuit here. Based upon the Framers' original understanding and the centuries-old legislative prayer tradition, *Marsh* upheld a prayer opportunity which does not proselytize or advance one faith or belief or disparage other beliefs.

Nevertheless, the Second Circuit, paying only lip service to *Marsh*, held that decision is defined by *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), a non-prayer case. Petitioner's valid prayer practice was thus invalidated because it "convey[ed] to a reasonable observer under the totality of the circumstances an official affiliation with [the Christian] ... religion." *Galloway v. Town of Greece*, 681 F.3d 20, 34 (2nd Cir. 2012). Thus, a legislative prayer practice must now comply with *Allegheny's* "endorsement" or "reasonable observer" test rather than *Marsh's* "no proselytization or disparagement" rule.

However, *Marsh* is unencumbered by *Allegheny*. Correcting this error by reversing the Second Circuit and applying *Marsh*, as written, is vitally important to South Carolina. First, the original understanding of the Establishment Clause not only

permitted legislative prayer; demonstrably Christian prayers were also consistent with that original understanding of the Framers.

Moreover, virtually from the State's founding, the South Carolina Legislature and other deliberative bodies in the State have opened sessions with explicitly Christian prayers. As prayers in the First Congress did, prayers before South Carolina bodies have invoked the name of Jesus Christ or used other Christian references.

To illustrate, in South Carolina's 1868 Constitutional Convention approving a state Establishment Clause, a prayer invoking Christ's name opened the second day's proceedings. *Proceedings of the Constitutional Convention of South Carolina,* 13 (1968). ("And all we ask is in the name of God our Father and Jesus our dear Redeemer. Amen."). Thus, Framers of the State Constitution, like authors of the First Amendment, did not perceive such non-proselytizing, yet explicitly Christian prayers, to be an "establishment" of religion..

After *Marsh*, South Carolina deliberative bodies understood such legislative prayers to be constitutional. Unfortunately, beginning with *Wynne v. Great Falls*, 376 F.3d 292 (4th Cir. 2004), the Fourth Circuit misconstrued and narrowed *Marsh* using *Allegheny* as the means. *See e.g. Joyner v. Forsyth Co.*, 653 F.3d 341 (4th Cir. 2011). Now the Second Circuit has followed suit. These rulings wrongly conclude that *Allegheny* constitutionally constricts legislative prayer, thereby requiring "nonsectarian" prayers.

Such decisions destroy the original understanding of the First Amendment upon which *Marsh* rested.

Secondly, S.C. Code Ann. Section 6-1-160 establishes procedures for invocations by deliberative public bodies. Section 6-1-160(A)(1), comporting with *Marsh*, requires that a "public invocation ... must not be exploited to proselytize or advance any one or to disparage any other faith or belief." These deliberative bodies may use, among other options, "an invocation speaker selected on an objective and rotating basis from among a wide pool of the religious leaders serving established religious congregations in the local community ...." Section 6-1-160(B).

Furthermore, "the Attorney General's office shall prepare a statement of the applicable constitutional law and, upon request, make ... available to a member of the General Assembly or a deliberative public body." Section 6-1-160(C). The Attorney General recently issued an opinion concluding that the Fourth Circuit decisions require a deliberative body's "prayer policy must be nonsectarian." *Op. S.C. Atty. Gen.*, January 28, 2013 (2013 WL 482679). While obliged to advise localities they are bound by the Fourth Circuit rulings, the Attorney General believes these decisions disregard the Framers' original intent.

Thirdly, the Second Circuit ruling raises fundamental Free Speech rights. Section 6-1-160(B)(3)'s option of selection on an objective and rotating basis from congregations in the community creates a limited public forum. Speech thus cannot be discriminated against based upon its content, as the Second Circuit did here. *Pleasant Grove City v. Summum*,

555 U.S. 460, 470 (2009), citing *Perry Ed. Ass'n. v. Perry Local Educator's Ass'n.*, 460 U.S. 37, 46, n. 7 (1983) ("... a government entity may create a forum that is limited to certain groups or dedicated solely to the discussion of certain subjects.").

Accordingly, for these reasons, South Carolina asks this Court to reverse the decision below and reaffirm *Marsh* as written. The State seeks to restore the original understanding of the Establishment Clause with respect to legislative prayer.

SUMMARY OF ARGUMENT

Like the Fourth Circuit, the Second Circuit misconstrued *Marsh*. Rather than applying *Marsh* and the Framers' original understanding of the Establishment Clause as it relates to legislative prayer, the court below mistakenly read *Marsh* through *Allegheny's* contracting lens. Referencing *Marsh*'s famously misunderstood footnote 14, the court relied upon *Allegheny's dicta* that the *Marsh* chaplain had "'removed all references to Christ.'" *Town of Greece*, 681 F.3d, *supra* at 27, quoting *Allegheny*, 492 U.S. *supra* at 603 (quoting *Marsh*, 463 U.S. at 783, n. 14). Thus, a "legislative prayer practice that, however well-intentioned, conveys to a reasonable observer under the totality of the circumstances an official affiliation with a particular religion violates the clear command of the Establishment Clause." *Town of Greece*, 681 F.3d, *supra* at 34.

Such analysis frustrates the original meaning of the Clause, applied in *Marsh*. By definition, prayer necessarily affiliates "with a particular religion." As demonstrated below, the Second Circuit ap-

proach is patently ahistorical. *Marsh* stands on its own feet. It is not dependent upon *Allegheny*, a non-prayer case. *Marsh* is based not upon a footnote, but the time-honored tradition, before and after the Founding, of opening legislative sessions with prayer. As *Marsh* recognized, "[c]learly the men who wrote the First Amendment Religion Clause did not view paid chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id.* at 788.

Marsh neither applied *Allegheny's* "endorsement test," nor depended upon the fact that Chaplain Palmer "removed all references to Christ after a 1980 complaint from a Jewish legislator." *Id.* at 793, n. 14. Indeed, *Allegheny's* citation to *Marsh's* footnote 14 regarding the removal of "all references to Christ," makes clear that *Allegheny* did not so much limit *Marsh*, as conclude that *Marsh's* analysis – based upon 200 years of history – did not extend to the holiday crèche. *Allegheny*, 492 U.S. at 606. ("Nor can *Marsh* given its facts and reasoning, compel the conclusion that the display of the crèche involved in this lawsuit is constitutional."). Surely, *Allegheny*, by explaining that the crèche display was not validated by traditional legislative prayer practices, did not mean these practices must be diluted to conform to the constitutional standards governing the crèche.

The plurality opinion in *Van Orden v. Perry*, 545 U.S. 677, 688, footnote 8 (2005) agrees. As Chief Justice Rehnquist recognized in *Van Orden*:

> [*Marsh*] ... rejected the claim that an Establishment Clause violation was presented because the prayers had once been offered in the Judeo-Christian tradition: In *Marsh, the prayers were often explicitly Christian,* but the chaplain *removed all references to Christ the year after the suit was filed.* (emphasis added).

(Opinion of Rehnquist, C.J., joined by Scalia, Kennedy, and Thomas, JJ.). Therefore, the notion that *Marsh* depended upon the actions of Chaplain Palmer, or upon a deliberative body not "'affiliating the government with one specific faith or belief,'" is wrong.

Accordingly, although "the prayers were often explicitly Christian" in *Marsh,* this legislative prayer practice was, nevertheless, upheld because of the "'unique history' of a practice 'deeply embedded in the ... tradition of this country.'" 463 U.S., *supra* at 786, 791. Such practice "[f]rom colonial times through the founding of the Republic and ever since has coexisted with the principles of the disestablishment and religious freedom ... ." *Id.* at 787.

Marsh's drawback was it did not go further. While emphasizing that federal judges should not parse individual prayers, *Marsh* could also have expressly recognized that, based upon the original understanding of the Establishment Clause, prayer practices which the lower courts now wrongly label

as "sectarian," are not necessarily unconstitutional. "Explicitly Christian" prayer has opened proceedings in Congress, assembly halls, town council chambers, and state houses since the Founding. As will be documented for the Court's edification, such explicitly Christian prayers opened congressional sessions *at the Founding* and beyond. Congress's prayer practices involved a duly appointed chaplain who performed "divine service" – in reality, a form of Christian worship service – prior to the start of each day's legislative business. Chaplains also performed divine service in the halls of Congress for funerals, historic celebrations and on the Sabbath for members of Congress and others. None of these were considered inconsistent with the Establishment Clause. If we are to interpret the Establishment Clause based upon history, as *Marsh* says we should, it ought to be the complete history, as it occurred.

Marsh, of course, is not limitless. Those limits should be maintained. In the *Marsh* Court's words, the prayer opportunity may not be "exploited to proselytize or advance any one, or to disparage any other faith or belief ... ." 463 U.S., *supra* at 794-795. Consistent therewith is the explanation of the Religion Clauses by its principal author, James Madison, who said "the meaning of the words [are] ... that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Congress* 758 (1789). Likewise, Justice Kennedy, in *Lee v. Weisman*, 505 U.S. 577, 597 (1992) explained that legislative prayer is

ordinarily not coercive. At the opening of legislative sessions, "... adults are free to enter and leave with little comment and for any number of reasons ... ."

Yet, despite the unique nature of legislative prayer – a traditional accommodation between religion and governmental authority, which the Establishment Clause allows – the Second Circuit tried to walk the proverbial tightrope. Unfortunately, the balance tipped on the side of the incorrect application of the Establishment Clause. The lower court gave lip service to *Marsh* on the one hand, but on the other, employed *Allegheny* as a limitation upon *Marsh* – thereby imposing a "reasonable observer" or endorsement test. *See Allegheny*, 492 U.S. at 592-594. (recognizing "endorsement" test). The Court of Appeals acknowledged that *Marsh* requires judges to refrain from "pars[ing] the content of a particular prayer," yet parsed Greece's prayer practice anyway. In the Second Circuit's view, "[t]he town's process for selecting prayer-givers virtually ensured a Christian viewpoint." Having set up the strawman, the lower court knocked it down, invalidating Greece's prayer practice because of "the steady drumbeat of often explicitly sectarian Christian prayers." *Town of Greece*, 681 F.3d at 32. As we shall see, the Framers and congressmen thereafter, would be dumbfounded by such a conclusion.

This Court, writing *Marsh*, did not intend federal judges to engage in such a "highwire" balancing action, censoring prayer in the process. Instead, *Marsh* should be accepted based upon legislative prayer's history and unique nature, particularly at

the Founding. Herein, South Carolina will, for the Court's benefit, plow the historical ground supporting legislative prayer that Marsh did not. Our purpose is to provide historical support that "explicitly Christian" prayer services opened and were an integral part of congressional proceedings at the Founding and during the early years of the Republic. So long as the prayer opportunity did not proselytize or disparage particular faiths or beliefs, such practices were well within the confines of the First Amendment.

Congress, even at the Founding, understood the Establishment Clause limitations which *Marsh* recognized. Although in the early Republic, America was predominantly Christian, and as seen below, the Framers had no constitutional difficulties with overtly Christian prayers opening congressional sessions, still, Congress sought broad religious diversity within that cultural context. Both the House and Senate included persons of nearly all religious persuasions, including millennialists, Catholics, Unitarians and even female evangelists, as part of its religious prayers and services. Even though the Framers clearly recognized that legislative prayer, which was voluntary and not coercive, in no way constituted an "establishment" of religion, Congress, nevertheless, steadfastly sought to ensure that no religious sect dominated either the congressional chaplaincy or the many religious services held in the halls of Congress.

We recognize that America is a far different place today than in 1789. By documenting herein

the religious practices of Congress at the Founding and beyond, we are not suggesting that the Court return to a bygone age. As Justice Scalia has written, "originalism ... in its undiluted form, at least, ... is medicine that seems too strong to swallow." Scalia, *Originalism The Lesser Evil* 57 U. Cinn. L. Rev. 849, 861 (1989). This is undoubtedly true, but nonetheless, the lessons taught by the Framers, that religious diversity and sectarian prayer are constitutionally compatible, hold true today, as then. This Brief will demonstrate the applicability of these principles.

ARGUMENT

As this Court recognized in *Alden v. Maine*, 527 U.S. 706, 741 (1999), in construing the Constitution, "[w]e look first to evidence of the original understanding ... ." The Court recently explored the original purpose underlying the First Amendment's Religion Clauses. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, ___ U.S. ___, 132 S.Ct. 694, 702 (2012), noted the enormous burdens placed upon dissenters from the Church of England "seeking to escape the control of the national church ... . These Puritans fled to New England, where they hoped to elect their own ministers and establish their own modes of worship." Even in the South, colonists who "brought the Church of England with them ... sometimes chafed at the control exercised by the Crown ...." Thus, the Court explained,

> [i]t was against this background that the First Amendment was adopted. Familiar with life under the established Church of England,

> the founding generation sought to foreclose the possibility of a national church. *See* 1 *Annals of Cong.* 730-731 (1789) (noting that the Establishment Clause addressed the fear that "one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform," (remarks of J. Madison)).

Id. at 703.

This Court has often recognized that the First Amendment Religion Clauses hardly forbid governmental acknowledgment of religion. As Justice Goldberg wrote in concurrence in *Abington School Dist. v. Schempp*, 374 U.S. 203, 306 (1963), "[u]ntutored devotion to the concept of neutrality can lead to ... a brooding and pervasive dedication to the secular and passive, or even active hostility to the religious. Such results are not only not compelled by the Constitution, but ... prohibited by it." Justice Clark, in *Schempp*, further noted "[i]t is true that religion has been closely identified with our history and government ... . [T]he Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him ... ." *Id.* at 212-213. And, Chief Justice Rehnquist, in *Van Orden v. Perry*, explained that "we have not, and do not adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion." 545 U.S., supra at 684, n. 3. The Chief Justice quoted *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) stating "'[t]here is an unbroken history of official acknowl-

edgment by all three branches of government of the role of religion in American life from at least 1789.'" *Id.* at 686.

This recognition of the importance of history provides the foundation for *Marsh*. There, Chaplain Palmer, a Presbyterian minister, had served as legislative chaplain for 16 years. As *Van Orden* later observed, the prayers of Chaplain Palmer were "often explicitly Christian ...." 545 U.S. at 688, n. 8. Indeed, Dr. Palmer's, *amicus* brief supporting grant of *certiorari* here, acknowledged that the prayers he gave prior to the *Marsh* lawsuit were "routinely identifiably Christian." He recounts examples which invoked Jesus Christ's name. *See* Brief of *Amicus Curiae* of Rev. Dr. Robert E. Palmer in Support of Petitioner at 3-5 in *Town of Greece v. Galloway,* No. 12-696.

Also, in his *Marsh* dissent, Justice Stevens pointed to the "clearly sectarian content of some of the prayers given by Nebraska's chaplain," including those referencing Christ's crucifixion and resurrection. 463 U.S. at 823 (Stevens, J., dissenting). Thus, application of the "endorsement" test to long-standing religious practices, such as legislative prayer, which has traditionally been "sectarian," is ill-conceived. Justice Kennedy, dissenting in *Allegheny County,* recognized instead the importance of history and tradition in interpreting the Establishment Clause:

> *Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the

> Establishment Clause, but rather that the meaning of the Clause is to be determined by references to historical practices and understandings ... .
>
> The ... [endorsement test approach] contradicts important values embodied in the Clause. Obsessive, implacable resistance to all but the most carefully scripted and secularized forms of accommodation requires this Court to act as a censor, issuing national decrees as to what is orthodox and what is not. What is orthodox, in this context, means what is secular; the only Christmas the State can acknowledge is one in which references to religion have been held to a minimum. The Court thus lends its assistance to an Orwellian rewriting of history as many understand it. I can conceive of no judicial function more antithetical to the First Amendment ... .

492 U.S. at 670, 677-678. (Kennedy, J., joined by Rehnquist, C.J., White, & Scalia, JJ, concurring in part & dissenting in part).

Justice Kennedy's fear is now stark reality. Under the Second Circuit's logic, one of the oldest continuing governmental practices – "sectarian" legislative prayer – violates the Establishment Clause even though the Framers clearly thought not. We ask that *Marsh* be restored to its former self and those prayer practices understood to be constitutional by the Framers, be ruled constitutional again. We document these practices below.

The Historical Evidence of the Original Understanding of the Establishment Clause in the Context of Legislative Prayer Leads Inescapably to the Conclusion that the First Amendment Does Not Forbid Prayers by and for Deliberative Bodies.

The Second Circuit's holding is completely at odds with the original understanding of the Establishment Clause as applied to legislative prayer practices. The historical evidence convincingly supports the fact that legislative prayer practices at the time of the First Amendment's adoption, as well as the Fourteenth Amendment' ratification, were, explicitly Christian in nature. Indeed, as shown below, at the Founding, and throughout the first half of the Nineteenth Century, the practice was for congressional chaplains to conduct "divine service" prior to the initiation of business. Divine service was also performed by congressional chaplains in the halls of Congress for funerals of members, for celebration of historic events, and on the Sabbath for the benefit of congressmen. In the latter case, these were worship services involving sermons preached by congressional chaplains or guest ministers. And nineteenth-century objections to these practices focused largely on use of public funds or objections by religious fundamentalists, not the First Amendment. Thus, Greece's invocation practices were well within the Framers' understanding of what the Establishment Clause permitted.

The Documented History of Congressional Prayer Demonstrates Sectarian Prayers are not Prohibited by the Establishment Clause.

Thomas J. Curry documents that early Americans viewed many traditions involving government and Christianity as not violative of the Establishment Clause. Curry writes:

> ... [t]he discrepancy between the widespread conviction of late eighteenth-century Americans that government possessed no power in matters of religion and the persistent interference of government in religious affairs arose out of the cultural and social context of the time. Americans enunciated their Church-State principles within a framework wherein Protestant Christianity and American culture intertwined ... .
>
> Customs like days of prayer and thanksgiving appeared not so much matters of religion as part of the common coin of civilized living.

Curry, *The First Freedoms: Church and State in America To The Passage of the First Amendment*, 218 (1986). At the time of adoption of the First Amendment, as Justice Story noted "... the general, if not the universal sentiment in America was that Christianity ought to receive encouragement from the state, so far as not incompatible with the private rights of conscience and the freedom of religious worship." Story, *Commentaries on the Constitution of the United States*, III, § 1868 (1833). Congressman Nisbet of Georgia described legislative

prayer conducted by paid chaplains as validly constituting "the union of religious principle with political conduct." *Congressional Globe*, 26th Cong., 1st Sess. 66 (Appendix 1839). Thus, in early America, references in legislative proceedings to Christian symbols of faith and the Christian deity were frequent and thought not to constitute an "establishment" of religion. Far from it. Instead, such references, whether in prayer, as part of a divine worship service, or in legislative proceedings, were well accepted.

Against this cultural backdrop, we now examine the early history of prayer in Congress. Historians document that the Continental Congress "... sprinkled its proceedings liberally with the mention of God, Jesus Christ, the Christian religion and many other religious references." Curry, at 217. Indeed, the First Continental Congress prayer in 1774, delivered by Episcopal minister Jacob Duché, ended with the words "[a]ll this we ask in the name and through the merits of Jesus Christ, Thy Son, and our Savior." Delahunty, *Varied Carols: Legislative Prayer In a Polity*, 40 *Creighton L. Rev.* 517, 533, n. 56 (April, 2007). Prior to Duché's service, Congress adopted a resolution requesting an opening prayer. Duché appeared in "full pontificals" and "read several prayers in the established form." Congress voted its thanks to Duché "... for performing [the] divine Services," which included, according to John Adams, an "extemporary prayer, which filled the

bosom of every man." 1 *Journals of the Continental Congress*, 27, n. 1, (1774).[1]

Significantly, the House Judiciary Committee found "... the same practice was in existence before and after the adoption of the constitution." *Report of House Judiciary Committee, 33d, Cong., 1st Sess., (1853)* (available in Johnson, *Chaplains In the General Government* 9 (1856). This is demonstrated by overwhelming evidence. For example, following adoption of the Constitution, the First Congress directed a Christian service as part of the inauguration of President Washington, held on April 30, 1789. Congress mandated that "members of the Senate and House of Representatives proceed to St. Paul's Chapel to hear divine service to be performed by the Chaplain of the Congress already appointed." Stokes, *Church and State in the United States*, I:485; 1 *Annals of Congress* 216 (1789).

This service was highly significant, foreshadowing future congressional prayer practices. A "divine service" is generally considered to be of fourteenth century origin and is "a service of Christian worship ... ." *Merriam-Webster Online Dictionary*. Such a service usually is a form of "worship according to a prescribed form and order." *Random House Dictionary of the English Language* (Unabridged, 1966).

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[1] *See also*, 1 *Journal of the Provincial Congress of South Carolina*, 1776 1110, 1112 (1776) (Charles Pinckney chosen President of the Province of South Carolina; "Ordered, that the Reverend Mr. Turquand, a Member, be desired to celebrate divine service in Provincial Congress.").

Importantly, this divine service was "not a service provided by an Episcopal church to which senators and representatives were invited, but an official service carefully arranged for by both houses of Congress and conducted by their duly elected chaplain, who happened to be the bishop of the Episcopal diocese of New York." Stokes, *supra*.

At St. Paul's Church, Bishop Samuel Provoost, Chaplain of the Senate, read prayers from the *Book of Common Prayer*. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 *Colum.L.Rev.* 2083, 2108 (1996).[2] Significantly, the various prayers were explicitly Christian and each referenced "Jesus Christ." As to which specific prayers were part of the divine service, it is important that on April 30, 1889 – as Congress had directed – on the one hundredth anniversary of the divine service held in St. Paul's chapel for President Washington's inaugural, a reenactment was conducted which "practically reproduce[d] the service on that memorable day." *See Program for Centennial Anniversary of George Washington's Inauguration*, 30 Apr. 1889 (available at http://wwl2.dataformat.com/Document.aspx?doc=28398.htm). The centennial ceremony consisted, in part, of reading Scripture passages by Bishop

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[2] See also, Martin May Medhurst, "God Bless the President: the Rhetoric of Inaugural Prayer," at 63 (1980) (unpublished Ph.D. dissertation, Pennsylvania State University) (on file with the Pennsylvania State University Library). Mr. Epstein cites this original work.

Provoost on that April day, a century earlier. Also part of his divine service were Te Deum Laudamus, the Apostles Creed and Several Collects from the *Book of Common Prayer*, including Collects for Peace, for Grace, our Civil Rulers, a Special Thanksgiving, a General Thanksgiving, and a Prayer for St. Chrysostom. The reading ended with "[t]he grace of our Lord Jesus Christ, and the love of God, and the fellowship of the Holy Ghost, be with you all evermore. Amen." *Id.*

Thus, the evidence is overwhelming that in April, 1789 – the very same session which approved the First Amendment for ratification – Congress directed members to attend a "divine service," conducted by its chaplain, which used *a number of prayers from the Book of Common Prayer*. These prayers referenced Jesus Christ, the Holy Ghost, the Holy Spirit, and many other Christian symbols.

There is much other compelling evidence of the Framers' intent regarding legislative prayer. Highly instructive are the documented practices of Bishop William White, the second Senate Chaplain, who served during the First Congress (1789-1790), and also immediately thereafter (until 1800). Bishop White was chaplain virtually at the moment of the creation and ratification of the Establishment Clause. In an 1830 letter to then Senate Chaplain Henry Van Dyck Johns, White reflected upon his own tenure as chaplain in those earliest years of the Republic:

> [m]y practice, in the presence of each house of Congress, was in the following series: The

> Lord's prayer; the collect Ash Wednesday; that for peace; that for grace; the prayer for the President of the United States; the prayer for Congress; the prayer for all conditions of man; the general thanksgiving; St. Chrysostom's prayer; the grace of the Lord Jesus Christ, etc.

Wilson, *Memoir of the Life of the Right Reverend William White* 322 (1839) (letter to the Reverend Henry V. D. Johns, Dec. 29, 1830).

Bishop White thus used a very similar divine service to the service his predecessor, Provoost, had employed for President Washington's inaugural. Both, as Episcopal ministers, read prayers extensively from the *Book of Common Prayer* and both used prayers which were explicitly Christian. More specifically, this "series" of prayers, enumerated in Bishop White's 1830 letter to Chaplain Johns, and identified as the typical prayer service he performed during his ten years as Senate Chaplain, was contained in the 1789 *Book of Common Prayer*. Thus, Bishop White unquestionably opened sessions of Congress with several prayers, each of which referenced Christ. Other Christian symbols such as "the Holy Spirit," "our Heavenly Father," and the "Holy Ghost" were also used. Again, we have highly persuasive evidence that at time of the adoption of the First Amendment, a "sectarian" prayer service, read from the *Book of Common Prayer*, was not deemed a violation of the Establishment Clause.

Notably, nine of the first ten Senate chaplains were Episcopalian. This means that for the first two

decades following adoption of the Establishment Clause, each of those Senate chaplains undoubtedly opened daily meetings of Congress by reading prayers from the *Book of Common Prayer*. *See, Ratification, Book of Common Prayer*. (Stating *Book of Common Prayer* is "declare[d] to be the Liturgy of the Episcopal Church ... ."). Indeed, the 1789 edition of the *Book* emphasized that the "Prayer for Congress" was "to be used *during their session.*" *Id.* at *Prayer of Congress.* (emphasis added). As seen above, this Prayer, as well as the others in the *Book of Common Prayer*, particularly those enumerated by Bishop White, irrefutably demonstrate that, during the early Republic, following adoption of the First Amendment, explicitly Christian prayers opened congressional business.

Congress, in choosing its two chaplains each year, was careful to direct that they rotate between the houses and be of different denominations. Even in the late eighteenth century, Congress wished to ensure diversity of faiths by requiring different denominations in the selection process. Therefore, while the early Senate chaplains were Episcopalian, the House contemporaneously selected Dr. Ashbel Green, a Presbyterian minister, as its Chaplain (1792-1800). In his autobiography, Dr. Green described that a "signal was given [in the senate chamber] for *prayers* ... by the vice president striking his desk with a key ... ." Dr. Green also spoke of the "service" he typically conducted. Jones, *The Life of Ashbel Green, V.D.M.*, 261-262 (1849) (emphasis added).

Dr. Green's recounting of his prayer practice confirms yet again that Congress opened with a "divine service" similar to those conducted by Chaplains Provoost and White. Based on Dr. Green's description, it is apparent he thought of his "prayers" as a "service" opening the typical legislative day. Dr. Green also described how, "after attending *prayers* in the House of Representatives," he often "had to wait from a quarter to half an hour" for Vice President John Adams to arrive. *Id.*, at 262. (emphasis added).

Baptist minister Obadiah B. Brown served as House Chaplain from 1807-1809, again in 1814-1815, and as Senate Chaplain in 1809-10. In 1809, a visitor recorded that

> the Speaker rapped on the table and Mr. Brown, a Baptist clergyman, the Chaplain of the House, went into the Clerk's place fronting the speaker's chair and addressed *the throne of grace* in a modest, appropriate, republican prayer of about eight or ten minutes, about half the members being in observing great decorum and apparent seriousness.

Hillhouse, *Obadiah B. Brown: A Neglected, Forgotten Baptist Hero* 4 (1993) (emphasis added) (*available at* http.//www.florida.baptisthistory.org/docs/monographs/obadiah_brown.pdf). The term "throne of grace" is taken from Hebrews (4:16), a Christian Biblical reference. This brief account shows that Brown also conducted a Christian worship service as House chaplain.

Chaplain Spencer Cone, a Baptist minister, served as Chaplain of the House in 1815. An example of Chaplain Cone's enthusiastic ministerial style is described in his biography. Cone and Cone, *The Life of Spencer H. Cone,* 142 (1857). As House Chaplain, Cone "fearlessly proclaimed the Gospel." During the congressional session, "a person, high in rank" became gravely ill. The man in question apparently sought out Chaplain Cone for aid. When, however, the man died, Chaplain Cone took to the floor of the House to preach about the lesson learned:

> ... the young chaplain ... made a striking allusion to those who lived without God in the world. When laid upon a death-bed, however and summoned to their account, they dare not meet the Judge. Then they call for God's people to supplicate, in their behalf, the God they had denied. ... But the hour of Mercy had passed, and they die in hopeless, terrible despair. This solemn truth he uttered boldly, and with striking effect, in the Hall of Representatives.

Id. at 142-143. Thus, Chaplain Cone preached a Christian sermon to Congress on the House floor regarding the need of sinners to seek God's mercy well before death. *Id.* at 143-144. In apparent reference to the same incident, Chaplain Cone himself recounted he "mentioned ... the last words of one of the members, who had died two or three weeks before," and that he "took occasion to prove from the Bible that 'except a man be born again, he cannot

enter the Kingdom of God.'" Armitage, *The Funeral Sermon on the Death of the Rev. Spencer Houghton Cone*, 38 (1853).

Other examples of congressional chaplains who performed divine service in Congress abound. Senate Chaplain John P. Durbin (1832) described his "religious services" for Congress in the mornings as including the Lord's Prayer. He stated he made morning prayers "as simple and devout as I can ... " and sought to assist members to "bear the fruit of salvation." Roche, *The Life of John Price Durbin:* 62, 63 (1889).

In 1832, a joint committee recommended, on the one hundredth anniversary of George Washington's birthday, that "the chaplains of the two Houses of Congress ... perform *divine service* in the capitol on the 22d instant ... ." 9 *Register of Debates*, 368 (1832). In performing the service, Chaplain Durbin read from Revelations and then spoke about how "[o]ur obligations to worship Jehovah are founded, mainly on his infinite excellence, our relations to him as his creatures, and his benefits to us." Roche, at 71. Moreover, on January 4, 1859, at the opening the new Senate chamber, a prayer was offered by the Rev. P. D. Gurley. In that prayer, there were references to "Jesus Christ," "our Father," and the "Father, Son, and Holy Ghost." Rev. Gurley asked God to protect "our country" and "all our precious interests." *Congressional Globe*, 35th Cong., 2d Sess. 204 (1859). Other examples of "sectarian" prayers opening legislative business include: *Congressional Globe*, 37th Cong. 2d Sess. 1 (1861) ("We are unwor-

thy of Thy regard; and yet Thou has so loved us as to give Thy Son to die for us; and if Thou didst not spare Him, we know Though wilt with Him freely give us all things."); *Congressional Globe*, 40th Cong., 1st Sess. 1 (1867) ("God grant that His blessing may be upon us and make us faithful in the discharge of all our high trusts and duties; and when we are called from this to another world may we are called from this to another world may we hear the great Judge saying to each of us individually, 'well done, good and faithful servant'; enter thou into the joy of Thy Lord. Through Jesus Christ we ask it. Amen."); *Congressional Record*, 43rd Cong., 1st Sess. 1 (1873) ("... Pardon and deliver us from all our sins, nationally and individually ... and [b]ring us everlasting life. Through Jesus Christ, our Lord. Amen").

Upon a member's death, Congress typically directed the chaplains to perform "divine service" in the Capitol prior to the funeral and burial. Congressional practices regarding funerals of members were also overtly Christian.

For example, in 1822, House Chaplain Jared Sparks delivered a lengthy sermon in the House upon the death of Senator William Pinckney. Sparks, a Unitarian minister, gave the following oration:

> [t]he promises of the Gospel will never fail. The truths which have been revealed from heaven, published by divine wisdom, and established by the miracles of Christ, will stand as firm as the pillars of the universe, or the throne of Omnipotence.

Sparks, *A Sermon Preached In The Hall of the House of Representatives In Congress ... Occasioned by the Death of the Hon. Wm. Pinckney.* Moreover, following the death of the Honorable Franklin Elmore, the *National Intelligencer* of May 31, 1850, contained the following notation:

> Both Houses will meet to attend the funeral. The Committee of Arrangements, Pallbearers and Mourners will assemble at 11 o'clock at the late residence of Mr. Elmore on Capitol Hill, and remove the corpse thence, in charge of the Committee of Arrangements, attended by the Sergeant-at-Arms, of the Senate Chamber, where *Divine Service will be performed.*

(emphasis added) (*available at* http://www.congressionalcemetery.org/hon-franklin-h-elmore.) (death of Hon. Franklin Elmore). Thus, performance of divine service at funerals in the halls of Congress was consistently part of the duties of congressional chaplains.

In the early 19th century, Congress began requiring chaplains to conduct divine service on the Sabbath for its members in the House chamber. House-Chaplain Jesse Lee, spoke of the "Sabbath duties of the Office." Lee, *The Life and Times of the Rev. Jesse Lee* 486 (1848). Lee's biographer noted that the congressional chaplain's function was to "open their [Congress's] proceedings with prayer and preach to them on the holy Sabbath ... ." *Id.* at 468; *see also*, Wilson,, (discussing chaplains "officiating in the public hall on Sundays"). And, in an Exhibit styled

Religion and the Federal Government, (Part 2), the Library of Congress documents this practice with various examples, including the sermons preached by a wide variety of guest ministers in Congress on the Sabbath. (*available at* http://www.loc./gov/exhibits/religion/relo6-2.html). The overview of this Exhibit states:

> [i]t is no exaggeration to say that on Sundays in Washington during the administration of Thomas Jefferson (1801 – 1809) and James Madison (1809-1817) the State became the church. Within a year of his inauguration, Jefferson began attending church services in the House of Representatives. Madison followed Jefferson's example, although unlike Jefferson who rode on horseback to church in the Capitol, Madison came in a coach and four. Worship services in the House – a practice that continued until after the Civil War – were acceptable to Jefferson because they were nondiscriminatory and voluntary. Preachers of every Protestant denomination appeared. (Catholic Priests began officiating in 1826). As early as January 1806, a female evangelist, Dorothy Ripley, delivered a campmeeting-style exhortation in the House to Jefferson, Vice President Aaron Burr, and a "crowded audience ... .
>
> Jefferson's actions may seem surprising because his attitude toward the relation between religion and government is usually thought to have been embodied in his recom-

> mendation that there exist a "wall of separation between church and state." In that statement, Jefferson apparently declaring his opposition, as Madison had done in introducing the Bill of Rights, to a "national" religion. In attending church services on public property, Jefferson and Madison consciously and deliberately were offering symbolic support to religion as a prop for republican government.

Id. Jefferson, the founder who wrote the oft-cited letter to the Danbury Baptist Association of Connecticut and thus, was attentive to Establishment Clause issues, had no compunction about congressional Sabbath services.

In these "church services," hymns were played by the Marine Band, but discontinued because the Band could not keep pace with the "psalm singing of the congregation ... ." The "speaker's podium was used as the preacher's pulpit." The Library of Congress Exhibit notes that the millenialist Reverend David Austin preached in the House in 1801. Austin "[h]aving proclaimed to his Congressional audience the imminence of the Second Coming of Christ, ... (and) took up a collection on the floor of the House to support services at 'Lady Washington's Chapel' in a nearby hotel where he was teaching that 'the seed of the Millenial estate is found in the backbone of the American Revolution.'" *Id.* In addition, millenialist John Hargrove preached on Sunday, December 26, 1802 "before the President and Congress. He preached, again by request, the following evening. He delivered another discourse before Congress, on

the twenty-fifth of December, 1804, on the Second Coming of the Lord and the Last Judgment. On more than one occasion he preached before the Legislature of Maryland." *The Historical Magazine*, Vol. III, No. 2, 76 (February, 1876). Following the 1802 sermon, the House "ordered, that the copies of the Sermon transmitted therewith be distributed among the members ... ." 4 *Annals of Congress*, 314 (1803).

As the Library of Congress Exhibit also notes, on January 8, 1826, Bishop John England of Charleston, South Carolina "became the first Catholic clergyman to preach in the House of Representatives." *Id.* Continuing, the Exhibit narrates as follows:

> [t]he overflow audience included President John Quincy Adams, whose July 4, 1821 speech England rebutted in his sermon. Adams had claimed that the Roman Catholic Church was intolerant of other religions and therefore incompatible with republican institutions. England asserted that "we do not believe that God gave to the Church any power to interfere with civil rights or our civil concerns."

Id. Bishop England concluded his sermon in the House chamber with the following: "Our Saviour himself tells his disciples, if they love him they will keep his word. The proof, then, of our love is not to be exhibited in our mere declaration, it is to be found in the manifestation of our assiduity to know what our creator has taught, that it may be the rule of our practice – that we may believe his declarations, obey his injunctions and adhere to his institu-

tions." Reynolds, *The Works of the Right Reverend John England, First Bishop of Charleston*, IV, 190 (1849).

In 1828, efforts, largely unrelated to concerns regarding the First Amendment, were made to abolish the Sunday service in the House chamber. In opposition, Representative Chilton of Kentucky staunchly defended this practice, noting that the Hall served two purposes: legislative business and worship "the very day set apart by himself for his service." 4 *Register of Debates* 1701 (1828). Despite the opposition, Congress continued the practice of Sabbath services for many more years.

Nineteenth-Century Objections to Legislative Prayer Focused on Using Public Funds for the Practice, Not on Supposed First Amendment Issues.

In the 1850s, Congress debated the abolition of congressional chaplains. One of the principal objections was the use of tax dollars to support the chaplaincy, rather than an objection that the practice generally violated the First Amendment. *See* Hamburger, *Separation of Church and State*, p. 167, n. 44 (2004) (quoting John Leland who "opposed the payment of government chaplains ... [but] did not complain of their appointment.")[3] Hamburger emphasized that Leland himself preached a sermon in

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[3] Leland thought that it was beyond a Legislature's power to pay chaplains, stating that "[i]f legislatures choose to have a chaplain, for Heavens sake, let them pay him by contributions, not out of the public chest."

the House of Representatives on January 3, 1802. *Id.*

The reason for this opposition from religious groups, such as so-called "hardshell Baptists," was fear of corruption of religion by government involvement, rather than separation of church and state as it is thought of today. This "evangelical separationism" movement began with Roger Williams. Williams "condemned the centuries-old linkage between the Christian church and the State ... forged under the Roman Emperor Constantine." In his view, the church should avoid the temptation of "an unholy bargain in which it exchanges its authority to witness to and judge the world in return for legal privileges and political power. Delahunty, at 535. Thus, the typical objection to the chaplaincy was not that government should avoid religion altogether, but that such religion should not take the form of paid chaplains which "politicized" religious principles. There is a major difference for purposes of the original understanding of the Establishment Clause.

In 1839, Congressman Cooper of Georgia sought unsuccessfully to end the practice of public funding of congressional chaplaincies. In Cooper's opinion, such practice was "without just and proper authority." By electing two chaplains of different denominations, the practice was seen by Cooper as "agitat[ing]" this "matter of religious denomination ... in this House." In his view, "we may not exercise powers not granted ... that we may prevent a union of

church and State." *Congressional Globe*, 26th Cong., 1st Sess., 83-84 (1839).

Congressman Nisbet of Georgia strongly disagreed. Nisbet rejected any argument regarding a union of church and state:

> [t]hat grave and venerable body which framed our present form of Government, had the benefit of the prayers of the ministers of that day and Congress had adopted the practice of electing persons to perform religious service, and he [Nisbet] hoped we would not now take upon ourselves to dispense with the services of the clergy.

Id. at 84.

And, on January 19, 1853, the Senate Judiciary Committee issued a report responding to "sundry petitions praying Congress to abolish the office of chaplain." *S. Rep. No.* 376, 32d Cong., 2d Sess. 1 (1853). The ground upon which the petitions were based was that "the provisions of law under which chaplains are appointed for the army and navy, and for the two houses of Congress, are in violation of the first amendment of the constitution of the United States which declares that 'Congress shall make no law respecting an establishment of religion or permitting the free exercise thereof.'"

In rejecting the petitions, the Senate Judiciary Committee invoked the original understanding of what constituted an "establishment" of religion. In the view of the Committee, an "establishment" referred:

... without doubt to that establishment which existed in the mother country, and its meaning is to be ascertained by ascertaining what that establishment was. It was the connexion with the state of a particular religious society by its endowment, at the public expense, in exclusion of, or in preference to any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or religious observances. These three particulars constituted that union of church and state of which our ancestors were so justly jealous, and against which they so wisely and carefully provided. It is true that, at the time of our constitution was formed, the strictness of this establishment had been, in some respects, and to a certain extent, relaxed in favor of Protestant dissenters; but the main character of the establishment remained. It was still, in its spirit inconsistent with religious freedom, as [a]matter of natural right to be enjoyed in its full latitude ... . If Congress has passed, or should pass, any law which, fairly construed, or should attempt to introduce, in favor of any church, or ecclesiastical association, or system of religious faith, all or any one of these obnoxious particulars – endowment at the public expense, peculiar privileges to its members or disadvantages or penalties upon those who reject its doctrines or belong to other communions – such law would be a "law respecting an estab-

> lishment of religion," and, therefore in violation of the constitution.

Id. at 1-2. In no way, concluded the Judiciary Committee, was the congressional chaplaincy in violation of the Establishment Clause, as defined by the original understanding of the Clause:

> [a]t every session two chaplains are elected – one by each house – whose duty is to offer prayers daily in the two houses and to conduct religious services weekly in the hall of the House of Representatives. Now, in this, no religion, no form of faith, no denomination of religious professor is established, in preference to any other, or has any peculiar privileges conferred upon it. The range of selection is absolutely free in each house amongst all existing professions of religious faith. *There is no compulsion exercised or attempted, upon any member or officer of either house, to attend the prayers or religious solemnities.* No member gains any advantage over another by attending, or incurs any penalty or loses any advantage by declining to attend.

Id. at 2. (emphasis added). As in *Marsh*, the Committee recognized the lack of compulsion or coercion in legislative prayer. With respect to paying chaplains with public funds, the Committee saw this objection as unwarranted because "it will equally apply to many other accommodations furnished to members of Congress at public expense." *Id.* The Committee thus concluded that "[i]n no sense of the phrase have we a national chaplaincy" any more

than there is a national church. According to the Committee, while it might be true that the denominations selected as chaplain are Christian, "that is not in consequence of any legal right or privilege, but by the voluntary choice of those who have the power of appointment." *Id.* at 3. The Committee found it stood to reason that "Christians will of course select, for the performance of religious services, one who professes the faith of Christ." *Id.*

The House Judiciary reached the same conclusions, that the petitions for abolition of the chaplaincy lacked merit. The purpose of the Establishment Clause was not to "level and discard all religion" but to "prevent rivalry among sects to the exclusion of others." *Report of House Judiciary Committee,* (available in Johnson, *Chaplains of the General Government* at 14 (1856). According to the Committee, "[i]n this age there can be no substitute for Christianity" because "in its general principles is the great conservative element on which we must rely for the purity and permanence of free institutions." *Id.* at 17.

As Congress debated the chaplaincy question, and other matters, the first three months of the 1856 session went without appointment of chaplains. "Ministers of the Gospel" from the Washington, D.C. community were thus utilized. In the Resolution providing for this substitute, a Preamble was adopted, stating:

> ... whereas, the great vital and conservative element in our system is the belief in the pure doctrines and divine truths of the Gospel of

> Jesus Christ, it eminently becomes the Representatives of a people highly favored to acknowledge in the most public manner their reverence for God ... .

Id. at 35. This Preamble was again adopted in 1857.

Thus, the Senate and House Committees' appreciation of the original understanding of the Establishment Clause is in marked contrast to the interpretation rendered by the Second Circuit here. Even though Greece used an absolutely neutral system of selecting ministers to deliver the opening prayer – one seemingly more painstakingly diverse than even Congress employed in the eighteenth and nineteenth centuries – the Second Circuit, still, held the Town violated the Establishment Clause. Even though there was not the slightest coercion or compulsion, the Town was held to have "established" a religion. Such a decision completely ignores the original intent of the Framers and the understanding of those who came immediately afterwards.

As Originally Understood, the Establishment Clause Allows Prayers Like Those at Issue in this Case.

We note Justice Thomas has recognized the Court's task "would be far simpler if we returned to the original meaning of the word 'establishment' than it is under the various approaches the Court now uses." *Van Orden,* 545 U.S. at 693 (Thomas J., concurring) citing *Cutter v. Wilkinson,* 544 U.S. 709, 728 n. 3 (2005) (Thomas J., concurring). As he further emphasized:

> [t]he Framers understood an establishment "necessarily [to] involve actual legal coercion." [*Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004)], *supra* at 52 ... (Thomas, J., concurring in judgment); *Lee v. Weisman*, 505 U.S. [*supra* at 640] ... (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*") ....

545 U.S. at 693. This analysis, not the "endorsement" test, should govern legislative prayer practices of the Town and other state and local entities elsewhere. Legislative prayer is without any coercion whatsoever. People can go or come as they please. The Founding Fathers never envisioned that the Establishment Clause prohibited prayer practices such as these. As seen above, explicitly Christian prayer practices were generally viewed at the Founding and beyond as easily constitutional. Prayer services, known as divine service, explicitly sectarian, were routinely performed by congressional chaplains and other ministers of various denominations in the halls of Congress with little or no concern about any violation of the Establishment Clause because that Clause addressed questions regarding a national church, certainly one not involved in legislative prayer.

Even in the early Republic, Congress emphasized religious diversity in its divine services. Although America was overwhelmingly Christian, and Congress had no reservations about Christian prayer

services, it nevertheless ensured that the various denominations, including those then out of the mainstream, such as Catholics and Unitarians, were represented in congressional prayer services. The National Legislature avoided having the same denomination serve both houses simultaneously. Chaplains rotated between House and Senate and were appointed for only one year. A Catholic priest was elected senate chaplain.

Importantly, Congress also sought ministers from the community at large to lead services. Thus, even in a homogeneous America, the religious diversity achieved by Congress was remarkable.

South Carolina recognizes America is far more culturally and religiously diverse today than yesterday. Nonetheless, the original understanding of the Establishment Clause bestows an important constitutional principle: both religious diversity and explicitly sectarian prayer may coexist in opening legislative sessions. Like Congress in the early Republic, the Town of Greece and South Carolina (in Section 6-1-160(C)) today ensure a cross section of the community's faith leaders are selected as legislative prayer-givers.

Marsh recognized that it is not the content of the prayer, which violates the First Amendment, but whether the *prayer opportunity* has been exploited to proselytize or advance particular beliefs or disparage others. As the Senate Judiciary Committee stated in its *Report* to Congress in 1853, "the range of selection is absolutely free in each house amongst all existing professions of religious faith."

As Congress in 1789, Greece in 2013, employs a system to ensure that religious leaders of all faiths participated in leading its prayers. Greece's system thus exploited no belief. Yet, the Second Circuit imposed an endorsement test upon that system. The result was that a religiously diverse selection process was struck down because the Court concluded the Christian prayer-givers outnumbered others and thus the Town "established" a religion. This conclusion was constitutional error. As Judge Niemeyer has persuasively written, a policy "for legislative prayer [which] is totally neutral, proactively inclusive, and carefully implemented ... in no manner, could be perceived as selecting, or expressing a preference for a particular religious leader, a particular religion or denomination, or a particular prayer." *Joyner v. Forsythe Co.*, 653 F.3d at 365 (Niemeyer, J. dissenting). The original understanding of the Establishment Clause was entirely consistent with this view and the Town of Greece's prayer policy complied with this understanding, and certainly with *Marsh*.

The Founders did not censor the wide variety of prayer-givers who provided divine service to Congress and neither should any interpretation of the Establishment Clause by this Court. If this original understanding is to have any meaning whatever, the prayer practices of the Town of Greece should be deemed constitutionally valid. We believe they are.

CONCLUSION

Accordingly, we ask the Court to reverse the Second Circuit decision in this case.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-696

In The
Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court.

SLF has an abiding interest in the protection of American religious and legal heritage. From a public interest perspective, SLF asserts that this Court's Establishment Clause jurisprudence and this Country's history require that the government accommodate religious practices, such as the 200-year-old practice of opening sessions of legislative and deliberative bodies with a prayer. America's religious heritage is a vital component of its system of laws. A balanced constitutional approach protects against unconstitutional hostility toward religion while ensuring that the government's accommodation does not amount to the unconstitutional establishment of religion.

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[1] Pursuant to this Court's Rule 37.6, SLF hereby represents that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of *amicus curiae* briefs by filing letters evidencing their consent with the Clerk of Court.

SUMMARY OF THE ARGUMENT

This Country's history reflects, and this Court's Establishment Clause jurisprudence mandates, the accommodation of religion. Since America's founding, legislative prayer has been an accepted part of its political and cultural heritage. In 1789, the First Congress, many of whose members had taken part in the framing of our Constitution, enacted legislation authorizing the appointment of paid chaplains and commenced the practice of opening each day of Congress with prayer. Nearly two centuries later, in *Marsh v. Chambers*, 463 U.S. 783 (1983), this Court found constitutional the Nebraska legislature's practice of opening each session day with a prayer. The Court found that legislative prayer is constitutional absent an impermissible motive in selecting the prayer-giver and absent evidence that the government exploited the prayer opportunity to proselytize or advance any one, or disparage any other, faith or belief. This Court's review focused on the government's actions and intent.

When reviewing the constitutionality of the Town of Greece's practice of opening its town council meetings with a prayer, the Second Circuit acknowledged that *Marsh* is the only Supreme Court decision that has ruled on the constitutionality of legislative prayer. Despite this acknowledgement, the Second Circuit disregarded both *Marsh* and this Court's Establishment Clause jurisprudence and instead, shaped and utilized its own test; a test which exhibits hostility toward and appears to render all accommodations of

religion, including legislative prayer, unconstitutional. Rather than analyzing the government's actions and intent, the Second Circuit looked to *Lemon v. Kurtzman*, 403 U.S. 602 (1991), and its progeny, focusing its review on the hypothetical feelings of an unknown observer. According to the Second Circuit, any evidence that an unknown observer may feel offended by an otherwise constitutional legislative prayer practice renders that practice unconstitutional. This test not only contradicts *Marsh*, but it further offends the historical principles underlying the Establishment Clause, U.S. Const. amend. I, and this Court's Establishment Clause jurisprudence.

Consistent with the text and intent of the Establishment Clause and America's longstanding accommodation of legislative prayer, this Court should reaffirm and clarify *Marsh*, such that a legislative or deliberative body does *not* violate the Establishment Clause when it permits a prayer to be said at or during a meeting of that body, absent evidence that it acted with an impermissible motive in selecting the prayer-giver; and so long as the government neither composed nor dictated the prayer's content. If the evidence indicates that the legislative or deliberative body composed or dictated the content of the prayer, then a court may review that content to determine whether the legislative or deliberative body exploited the prayer opportunity by coercing an observer to pray.

Such an approach loyally complies with the central meaning of the Religion Clauses, which

promote tolerance of all creeds. It is true to the text because it focuses on whether the government established religion, it protects observers from the perils our Framers sought to protect, and it is consistent with this Court's jurisprudence which mandates the accommodation of religion. This Court should adopt this approach and preserve the best of America's traditions – tolerable acknowledgement of beliefs widely held among the people of this Country.

ARGUMENT

I. Introduction.

For over 200 years, legislative and deliberative bodies have opened their meetings with prayer. *Marsh*, 463 U.S. at 792. This Court has consistently recognized that any interpretation of the Establishment Clause should "comport[ ] with what history reveals was the contemporaneous understanding of its guarantees."[2] *Lynch v. Donnelly*, 465 U.S. 558, 673 (1984). "[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the [legislative prayer] practice

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[2] *See Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 233-34 (1963) (Brennan, J., concurring); *Walz v. Tax Comm'n of the City of N.Y.*, 397 U.S. 664, 671 (1970) (explaining that the Court must be careful to not "undermine the ultimate constitutional objective [of the Establishment Clause] as illuminated by history") (citation omitted).

authorized by the First Congress – their actions reveal their intent." *Marsh*, 463 U.S. at 790. Following these principles of constitutional interpretation, and heeding Justice Holmes' aphorism that "a page of history is worth a volume of logic," *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921), history provides the backdrop for determining whether a legislative prayer practice "establishes" religion.

"Government policies of accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage." *County of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in judgment and dissenting in part). "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (quoting *Lynch*, 465 U.S. at 674). America's founding and history is replete with official acknowledgments of religion and accommodation of prayer. Constitutional Framers including George Washington, Thomas Jefferson and James Madison, all offered prayers in their inaugural addresses and Thanksgiving Proclamations. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 633-35 (1992) (Scalia, J., dissenting); *County of Allegheny*, 492 U.S. at 671 (citing 1 J. Richardson, *A Compilation of Messages and Papers of the Presidents*, 1789-1897, p. 64 (1899) (quoting President George Washington's first Thanksgiving Proclamation)). Federal courts opened their sessions with prayers offered by clergymen invited by this Court's

first Chief Justice, John Jay.[3] Letter from John Jay to Richard Law (Mar. 10, 1790), *reprinted in* 2 The Documentary History of the Supreme Court of the United States: 1789-1800, The Justices on Circuit, 1790-1800 at 13-14 (Maeva Marcus ed., Columbia University Press 1988). And, in 1789, the First Congress enacted legislation authorizing the appointment of paid chaplains and commenced the practice of opening each day with prayer. *Marsh*, 463 U.S. at 788.

With the knowledge and understanding that prayers are inherently religious,[4] "the first Congress

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[3] Opponents of legislative prayer frequently cite John Jay's objection to the appointment of Reverend Jacob Duche, an Anglican minister, as chaplain of the First Continental Congress as evidence that delegates objected to government prayer in general. *See Marsh*, 463 U.S. at 791. Their reliance on Jay's objection is misplaced. His objection was to the particular minister and not to the practice, as evidenced by his invitations to clergymen to open sessions of Article III courts with a prayer.

[4] On June 28, 1787, Benjamin Franklin spoke to the Constitutional Convention and stated,

> I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth – *that God governs the affairs of men* . . I therefore beg leave to move – that henceforth prayers, imploring the assistance of Heaven, and its blessing on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that service –

Max Farrand, *1 The Records of the Federal Convention of 1787*, 451-52 (Max Farrand ed., Yale University Press 1911), *available at* http://oll.libertyfund.org/title/1057/95866 (last visited July 24, 2013).

assembled under the Constitution, many of whose members had taken part in framing that instrument[,]" did not believe that opening legislative sessions with prayer established religion. *Marsh*, 463 U.S. at 790 (citations omitted). If they had, then they would not have authorized such prayers only three days after they finalized the Bill of Rights. *Id.* at 788. The contemporaneous nature of these actions provides "weighty evidence" of the true meaning of the Establishment Clause, consistent with this Court's holding in *Marsh* that legislative prayer *per se* does not violate the Establishment Clause. *See id.* at 790, 792.

In *Marsh*, this Court further held that a legislative prayer practice is constitutional absent evidence of an "impermissible motive" in selecting the prayer-giver and absent evidence that the government exploited the prayer opportunity to "proselytize or advance any one, or disparage any other, faith or belief." *Id.* at 792-95. History mandates that in reviewing a government act to determine whether it establishes religion, the inquiry must focus on the government's actions. *See id.* at 788-91; *Van Orden*, 545 U.S. at 686-87. This approach is consistent with the understanding that the Establishment Clause "does not purport to protect individual rights." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring in judgment). Rather, the Establishment Clause is a federalism provision

meant to protect states from federal interference[5] and to prevent the federal government from "coerc[ing] anyone to support or participate in religion or its exercise" by the force of law. *Lee*, 505 U.S. at 587 (majority opinion); *see id.* James Madison "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship in any manner contrary to their conscience." *Wallace*, 472 U.S. at 95. The Framers' sponsorship of prayer at inaugurations, in federal courts and in Congress, combined with the Framers' desire to prohibit the government from exerting its power over the states or coercing citizens through the use of force, provides historical support for reaffirming the test set forth by this Court in *Marsh*. Thus, if the government does not coerce the listener and the listener may do as he likes, then the government prayer does not establish religion. *See generally Lee*, 505 U.S. 577.

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[5] In his dissent in *Wallace v. Jaffree*, 472 U.S. 38 (1985), Justice Rehnquist provides a detailed history of the Founders' debate regarding the precise language of the Establishment Clause. *Id.* at 92-99 (Rehnquist, J., dissenting). Notably, Justice Rehnquist explains that James Madison found the Establishment Clause necessary to address concerns expressed at several state conventions that "Congress might rely on the Necessary and Proper Clause to infringe the rights of conscience or to establish a national religion[.]" *Id.* at 95-96.

II. The Second Circuit disregards this Court's Establishment Clause jurisprudence and instead utilizes a test hostile to constitutionally protected religious accommodation.

When reviewing the constitutionality of a legislative prayer practice, circuit courts acknowledge that *Marsh* "is the only Supreme Court decision . . . that has ruled on the constitutionality of legislative prayer."[6] *Galloway v. Town of Greece*, 681 F.3d 20, 26 (2d Cir. 2012); *see Rubin v. City of Lancaster*, 710 F.3d 1087, 1091 (9th Cir. 2013), *petition for cert. filed*, (U.S. July 17, 2013) (No. 13-89); *Joyner v. Forsyth County*, 653 F.3d 341, 346 (4th Cir. 2011). Despite acknowledging that legislative prayer is constitutional absent evidence of an "impermissible motive" in

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[6] "The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute." *Schempp*, 374 U.S. at 220 (quoting *Zorach v. Clauson*, 343 U.S. 306, 312 (1952)). Ignoring this basic tenet of Establishment Clause jurisprudence, opponents of legislative prayer commonly refer to *Marsh* as an exception. To do so, they exploit Justice Brennan's characterization of *Marsh* as a "narrow" opinion with the hope that by doing so enough times, it becomes an exception rather than the rule. *Marsh*, 463 U.S. at 795 (Brennan, J., dissenting). But, constitutional jurisprudence does not work that way. In explaining that *Marsh* is not an exception to the First Amendment, Justice Kennedy wrote, "The First Amendment is a rule, not a digest or compendium. A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause." *County of Allegheny*, 492 U.S. at 670.

the prayer-giver selection and absent exploitation by the government of the prayer opportunity, the Second Circuit disregards both precedent and historical practice. Instead, it uses an unworkable "endorsement" test that focuses on the imagined perceptions of an unknown observer and that is inherently hostile to the accommodation of religion.

Specifically, the Second Circuit asked, "whether the town's practice, viewed in the totality by an ordinary, reasonable observer, conveyed the view that the town favored or disfavored certain religious beliefs[.]" *Galloway*, 681 F.3d at 29. It found the prayer practice unconstitutional because it is "an endorsement of a particular religious viewpoint." *Id.* at 30. The Second Circuit crafted its unknown observer test by piecing together portions of the *Lemon* tripartite "test," Justice O'Connor's clarification of the *Lemon* test (commonly referred to as the endorsement test), and an over-reading of this Court's dictum in *Allegheny* which re-characterizes *Marsh* as an endorsement test.[7] In doing so, it added to the "tangle"

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[7] As explained in detail by both the Eleventh and Ninth Circuits, the dictum in *Allegheny* does not alter the *Marsh* holding, it "merely illuminates [*Marsh*'s] boundaries." *Rubin*, 710 F.3d at 1092-94; *Pelphrey v. Cobb County*, 547 F.3d 1263, 1271-72 (11th Cir. 2008). Circuit courts often mischaracterize the dictum in *Allegheny* as re-interpreting this Court's holding in *Marsh* to require that legislative prayers be nonsectarian and mandating a review that focuses on the effect prayer has on a hypothetical listener. To reach its conclusion, the Second Circuit had to take this a step further and assert that *Allegheny*'s "holding" re-characterized *Marsh*'s "holding" into an endorsement test

(Continued on following page)

of various tests and promoted analysis under which a hypothetical government could wipe all religious remnants from society, contradicting *Marsh*'s rejection of the *Lemon* test. No doubt aware of the persuasive criticism of *Lemon* and its derivative, the endorsement test,[5] the Second Circuit did not cite *Lemon*. The circuit court's lack of citation however, does not negate its reliance on *Lemon* and its progeny which have "no more grounding in the history of the First Amendment than does the wall theory upon which [they] rest." *Wallace*, 472 U.S. at 110.

First developed in 1971, the *Lemon* test requires a three-step examination to determine the constitutionality of government action concerning religion. Such action: (i) must have a secular purpose; (ii) its primary effect must neither advance nor inhibit religion; and (iii) it must avoid excessive entanglement with religion to pass constitutional scrutiny.

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focused on an unknown observer's feelings. *Galloway*, 681 F.3d at 29 n.3.

[5] *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment) (referring to the *Lemon* test as "some ghoul in a late-night horror movie" and noting that over the years six of the then-seated Justices had "personally driven pencils through the creature's heart"); *see also Newdow*, 542 U.S. at 45-54 (Thomas, J., concurring in judgment); *County of Allegheny*, 492 U.S. at 655-59 (Kennedy, J.); *Edwards v. Aguillard*, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting); *Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting); *Wallace*, 472 U.S. at 108-13 (Rehnquist, J.); *Roemer v. Md. Bd. of Pub. Works*, 426 U.S. 736, 767-69 (1996) (White, J., concurring in judgment).

Lemon, 403 U.S. at 612-13. *Lemon*'s "three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service." *Wallace*, 472 U.S. at 110. That faulty doctrine, the idea that a wall must separate church and state, is "not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state," *Lynch*, 465 U.S. at 673, and is wholly inapplicable to the constitutionality of legislative prayer. . As evidenced by Jefferson's offering of prayers in both his first and second inaugural addresses and in the drafting of bills that specifically accommodated religion in the public sphere,[9] the Constitution does not "require complete separation of church and state; [rather,] it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any." *Lynch*, 465 U.S. at 672.

Recognizing the weak link between the *Lemon* test and the "principles enshrined in the Establishment Clause," Justice O'Connor articulated the endorsement test in her *Lynch* concurrence. *Id.* at 688-89 (O'Connor, J., concurring). That test is based

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[9] Jefferson "prayed in his first inaugural address" and in his second he "acknowledged his need for divine guidance and invited his audience to join his prayer." *See Lee*, 505 U.S. at 633-34 (Scalia, J., dissenting); *see generally* Daniel L. Dreisbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations*, 69 N.C.L. Rev. 159 (1990).

on the premise that government may neither endorse nor disapprove religion. A perceived government endorsement of religion sends a message to nonbelievers that they are "outsiders" and to adherents that they are "favored members of the political community." *Id.* at 688. Further expounding on the "effect" prong of *Lemon*, the Second Circuit employed a "reasonable observer" standard that also focused not on government actions, but on the feelings of an unknown observer. *Galloway*, 681 F.3d at 29-30. While Justice O'Connor sought to make clear how the tripartite test was grounded in history, any test that focuses on an individual's feelings and personal interpretation of a government act rather than the government act itself, exhibits an "unjustified hostility toward religion, a hostility inconsistent with our history and our precedents[.]" *County of Allegheny*, 492 U.S. at 655.

A. *Lemon* and its progeny are constitutionally incompatible with accommodation of religion.

The test employed by the Second Circuit violates the Constitution's affirmative mandate of accommodation. *See Lynch*, 465 U.S. at 672-74 (majority opinion) (explaining that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any"). Rather than accommodate religion, the *Lemon* and endorsement tests exhibit a hostility towards religion that is "most unwelcome." *County of Allegheny*,

492 U.S. at 668-69. Under the endorsement tests and arguably the effect prong of *Lemon*, any practice having "the effect of communicating a message of government endorsement or disapproval of religion" or having the effect "whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community" violates the Establishment Clause. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). These tests base "the unconstitutionality of a government practice that does not *actually* advance religion on the hopes of the government that it *would* do so." *McCreary County v. ACLU*, 545 U.S. 844, 901 (2005) (Scalia, J., dissenting).

This Court's Establishment Clause jurisprudence holds that certain religious practices that *accommodate* religion do not *establish* religion. In *Marsh*, the Court examined several of these practices and concluded that "legislative prayer presents no more potential for establishment than the provision of school transportation, *Everson v. Board of Education*, 330 U.S. 1 (1947), beneficial grants for higher education, *Tilton v. Richardson*, 403 U.S. 672 (1971), or tax exemptions for religious organizations, *Walz*[, 397 U.S. 664]." *Marsh*, 463 U.S. at 791. Since *Marsh*, the Court continues to affirm that anything less than accommodation would require "callous indifference" towards religion. *Van Orden*, 545 U.S. at 684 (quoting *Zorach*, 343 U.S. at 306). Had the Framers wanted to rid this Country of any reference that may make religion relevant, they could have done so. Instead,

they authorized legislative prayer, invited clergymen to open sessions of federal courts, and offered prayers in their own official capacities.

B. The Framers sought to promote tolerance of religion, not to rid this Country of any act that may offend an unknown observer.

The *Lemon* and endorsement tests which focus on "whether nonadherents would be made to feel like 'outsiders' by government recognition or accommodation of religion[,]" "require a relentless extirpation of all contact between government and religion." *County of Allegheny*, 492 U.S. at 657, 669. The Establishment Clause did not create any individual rights. *Newdow*, 542 U.S. at 50. If it had created an individual right to not hear or see something that may offend, then nearly everything, including legislative prayer, could be viewed by some unknown observer as violating the Establishment Clause. As Justice Kennedy explained in his separate opinion, "[i]f the intent of the Establishment Clause is to protect individuals from mere feelings of exclusion, then legislative prayer cannot escape invalidation." *County of Allegheny*, 492 U.S. at 673.

History teaches that this was not what the Framers intended. In drafting the Establishment Clause, they sought to rein in any future Congress that tried to impose a religion on the states and citizens through the use of force. *Newdow*, 542 U.S. at

50. The Framers "looked at invocations as conduct whose effect harmonized with the tenets of some or all religions." *Marsh*, 463 U.S. at 792 (internal quotations omitted). Evidencing this intent and accommodation of legislative prayer, Samuel Adams stated that, "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country." *Id.* at 791-92. "To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." *Lee*, 505 U.S. at 590 (majority opinion).

III. This Court should reaffirm and clarify *Marsh* by articulating a test for adjudicating Establishment Clause challenges to legislative prayer practices, focusing on the government's actions and intent.

Consistent with the text and intent of the Establishment Clause and America's longstanding accommodation of religion, this Court should reaffirm the constitutionality of America's 200-year tradition of opening meetings of its legislatures and deliberative bodies with prayer. In doing so, this Court should clarify *Marsh* and denounce any review of legislative prayer that focuses on the feelings of, or effect on, an unknown observer. This will allow government to accommodate the practice of legislative prayer and protect against the unwarranted hostility inherent in the *Lemon* and endorsement tests.

Specifically, this Court should find that a legislative or deliberative body does not violate the Establishment Clause when it permits a prayer to be said at or during a meeting of that body, absent evidence that it acted with an impermissible motive in selecting the prayer-giver; and so long as the government neither composed nor dictated the content of the prayer, other than to suggest that the prayer not proselytize or advance any one, or disparage any other, faith or belief. If the evidence indicates that the legislative or deliberative body composed or dictated the content of the prayer, then a court may review that content to determine whether that body exploited the prayer opportunity by coercing an observer to pray.

A. Legislative prayer practices are constitutional absent evidence that the government selected or rejected a prayer-giver because of his faith or beliefs.

Review of a legislative prayer practice must start with a review of the government's selection of the prayer-giver. In *Marsh*, this Court focused on the government's actions and held, "Absent proof that the chaplain's reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause." *Marsh*, 463 U.S. at 793-94. Necessarily, the following question arises: What is an impermissible motive? In *Marsh*, although the Court did not

elaborate on this, its holding made clear that the government did not act with an impermissible motive because it found the uninterrupted sixteen-year tenure of a single-faith Presbyterian minister did not demonstrate a preference for a particular faith. *Id.* Thus, for purposes of impermissible motive analysis, the bar for proving such impermissible motive is quite high.

This Court should define "impermissible motive" such that, if a legislative or deliberative body's prayer-giver selection practice is neutral towards all religions, then the government did not act with an impermissible motive. Stated another way, absent evidence that the government selected or rejected a potential prayer-giver because of his faith or beliefs, the government did not act with an impermissible motive. Focusing the inquiry on the government's actions and intent is consistent with the understanding that the Establishment Clause imposes restraints on the government while allowing the government to accommodate religion.

In *Marsh*, the Court focused its inquiry on the government's actions and intent. *See Rubin*, 710 F.3d at 1096 (noting that the *Marsh* Court trained its analysis not only on history but on the government's actions and looked at evidence that went solely toward the government's reasons for retaining the chaplain). This Court explained that Congress did not select and retain the chaplain because of his particular faith or beliefs, but rather "because his performance and personal qualities were acceptable to the

body appointing him." *Marsh*, 463 U.S. at 793. In reflecting on *Marsh*, the Eleventh Circuit explained: "the 'impermissible motive' prohibition seems directed at the conscious selection of a speaker from one denomination or sect for the purpose of promoting or endorsing the beliefs held by that speaker." *Pelphrey*, 547 F.3d 1263, 1281 (11th Cir. 2008) (adopting district court's interpretation of Establishment Clause). It continued, "the Court appeared to deem constitutionally unacceptable the selection and retention of a particular speaker *because* of that speaker's sectarian affiliation or religious beliefs." *Id.* "[T]he impermissible motive standard does not require that all faiths be allowed the opportunity to pray. The standard instead prohibits purposeful discrimination." *Id.*

This approach loyally complies with "the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored." *Lee*, 505 U.S. at 590 (majority opinion). "[T]he [Establishment Clause's] guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995).

In 2008, the Eleventh Circuit reviewed two prayer-giver selection practices employed by Cobb

County, Georgia and applied this definition of "impermissible motive."[10] Under the first practice, the county invited clergymen from all religious organizations listed in the Yellow Pages, the internet and business cards. *Pelphrey*, 547 F.3d at 1267. Under the second practice, the county invited only clergymen from Christian churches and excluded clergymen from Jewish, Islamic and other religions. *Id.* at 1267-68. The court found the first practice constitutional because the county "did not exclude religious institutions based on their beliefs" and in many instances, the county was "unfamiliar with the beliefs of the institutions." *Id.* at 1278. But, the court found the second practice unconstitutional because the county considered the faith and beliefs of potential prayer-givers and "categorically excluded certain faiths" from the list of potential invocational speakers. *Id.* at 1282.

In contrast, circuit courts employing the *Lemon* test or endorsement tests consistently either disregard the government's selection process or incorrectly focus their review on an unknown observer's perceptions of the prayer-giver selection process and identity.[11] This approach ignores this Court's Establishment

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[10] *See also Rubin*, 710 F.3d at 1098 (finding the city's selection process constitutional because the city clerk invites "every local religious group he can find" and "schedule[s] appearances on 'a first-come, first-served' or other random basis").

[11] *See Turner v. City Council of Fredericksburg, Va.*, 534 F.3d 352 (4th Cir. 2008) (declining to review the selection process); *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004); *Bacus v. Palo Verde Unified Dist. Bd. of Educ.*, 52 Fed. Appx. 355 (9th Cir. 2002) (rev'd on standing grounds); *see*

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Clause jurisprudence which provides that the government may not prefer one religion over another or nonreligion over religion. *County of Allegheny*, 492 U.S. at 605 (majority opinion). The Second Circuit's test requires the government to review and to select the prayer-giver based on the prayer-giver's faith and beliefs and whether those beliefs would lead an unknown observer to feel offended. Because this approach requires that the government, in effect, intentionally discriminate against certain faiths or beliefs; it provides the government with no means to accommodate legislative prayer and instead, forces the government to violate the Establishment Clause.[12] This Court should reject the Second Circuit's interpretation of *Marsh* because it fails to allow for the accommodation of religion and is openly hostile toward legislative prayer.

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also Bacus v. Palo Verde Unified Dist. Bd. of Educ., 11 F. Supp. 2d 1192, 1197-98 (C.D. Cal. 1998) (reviewing selection process, but failing to apply a government-act-focused approach).

[12] The Second Circuit explained that it would even find unconstitutional a completely random prayer-giver selection process such as a lottery, or a prayer-giver selection process that actively pursues prayer-givers of all faiths whose members reside within the town. *Galloway*, 681 F.3d at 31.

B. Merely providing a forum for legislative prayer does not violate the Establishment Clause.

If the government exercised neutrality in its selection of the prayer-giver and did not act with an impermissible motive, the following question arises: Whether the content of the prayer causes an Establishment Clause violation? A two-step analysis answers this question. Courts should only review the content of a legislative prayer if there is evidence that the *legislative or deliberative body* exploited the prayer opportunity to proselytize or advance any one, or disparage, any other belief or faith. Thus, courts must first determine whether the evidence indicates that the legislative or deliberative body composed or dictated the content of the prayer, other than to suggest that the prayer neither proselytize or advance any one, nor disparage any other, faith or belief. If it did not, then the court should refrain from reviewing the prayer content because the government cannot violate the Establishment Clause unless it affirmatively acts. If the government did compose or dicate the prayer's content, then the court may review that content to determine whether the government exploited the prayer opportunity by coercing anyone to support or participate in any religion or its exercise or to disparage a faith or belief.

"Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political cultural heritage." *County of Allegheny*, 492 U.S. at 657. Religious accommodation

"follows the best of our traditions." *Zorach*, 343 U.S. at 314. A legislative or deliberative body's act of providing its citizens with the opportunity to give a prayer before or during its meetings is an example of a constitutionally permissible accommodation of religion. *See Marsh*, 463 U.S. at 792. A finding that the government does not violate the Establishment Clause by providing a forum for legislative prayer is consistent with *Marsh* and this Court's Establishment Clause jurisprudence which require the government to remain neutral between religions. Generally speaking, prayer is an exercise that spans across all religions, faiths and beliefs. Legislative prayer does not itself amount to a government establishment of religion because of its inherent religious content; there must be something more. In *Marsh*, this Court held, "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95. Even though the prayers were often "explicitly Christian[,]"[13] the Court explained that "it [was] not for [it] to embark on a sensitive evaluation or to parse the content of a particular prayer." *Id.* at 795. The courts themselves have stated that they "can hardly

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[13] *Marsh*, 463 U.S. at 792-93 n.14 (references to Christ were removed only *after* the lawsuit was filed); *see Van Orden*, 545 U.S. at 688 n.8 (describing the prayers in *Marsh* as "explicitly Christian").

imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible." *Rubin*, 710 F.3d at 1101 (quoting *Pelphrey*, 547 F.3d at 1272). Thus, courts should only embark on such a review when the government has composed or dictated the content of legislative prayer.

C. Absent evidence that the government coerced observers to participate in a prayer, government composure of the prayer is a tolerable constitutional accommodation of religion.

Although "[i]t is a cornerstone principle of our Establishment Clause jurisprudence that it is no part of the business of a government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government[,]" *Lee*, 505 U.S. at 588 (internal quotations omitted), a government's composure of a prayer is not *per se* unconstitutional. When a court finds that the legislative or deliberative body dictated or composed the prayer, it must address the following question: Does the government's composure of legislative prayer cross the line from accommodating religion to establishing religion?

The Court's self-described "tangle" of various tests leaves lower courts and the attorneys practicing in them with a confusing, convoluted maze through which they must travel to determine the most efficient

way to adjudicate and litigate Establishment Clause cases. In addition to this "hopeless disarray," *Marsh* provides little guidance on what it meant by "proselytizing or advancing any one, or disparaging any other, faith or belief." Lower courts that strictly follow *Marsh* also do not provide guidance because in the absence of evidence that the government composed or dictated the content of the prayers, those courts have properly declined to review the prayer content. *See Jones v. Hamilton County*, 891 F. Supp. 2d 870, 888-90 (E.D. Tenn. 2012) (declining to review prayer content because of lack of evidence that the government intended to proselytize, advance or disparage any faith or belief); *see also Rubin*, 710 F.3d at 1100-01 (expressly refusing to review prayer content); *Pelphrey*, 547 F.3d at 1278 (affirming the district court's ruling and refusing to parse the content of prayers absent evidence of government exploitation). This Court is left to rangle with the unknown observer approach derived from *Lemon* and the endorsement tests, and the coercion test articulated by Justice Kennedy in *Allegheny* and *Lee*.

Of these, the coercion test is the most sensible because it focuses on the government's actions and intent, and ensures that the government will recognize all religious and nonreligious perspectives. According to the coercion test, "[n]oncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more

substantial than practices that are accepted in our national heritage." *County of Allegheny*, 492 U.S. at 670 (Kennedy, J.). This test supports the conclusion that absent evidence that the government coerced observers into praying or disparaged any religion, a legislative prayer should be found constitutional. Our national heritage includes many examples of persons acting on behalf of our government who composed and recited prayers. This practice has continued into modern-day America, as evidenced by our current President's composure and recitation of prayers.[14] Where, like here, the legislative or deliberative body does not force the citizens attending its meetings to support or participate in the prayer offered by a neutrally selected prayer-giver, the government does not act coercively, and thus does not establish religion.

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[14] President Barack Obama has invoked God and offered prayers in his official acts as President of the United States, including during his first official act, his inaugural address, and various Thanksgiving Proclamations and National Day of Prayer Proclamations in which he has asked for "God's continued guidance, mercy, and protection." Proclamation No. 8974, 3 C.F.R. Proclamation 8974 (May 1, 2013). *See also* President Obama's Inaugural Address, 1 Pub. Papers 4 (Jan. 20, 2009), *available at* http://www.gpo.gov/fdsys/pkg/PPP-2009-book1/pdf/PPP-2009-book1-Doc-pg1.pdf (last visited July 24, 2013) ("America, . . . let it be said by our children's children that when we were tested we refused to let this journey end, that we did not turn back nor did we falter; and with eyes fixed on the horizon and God's grace upon us, we carried forth that great gift of freedom and delivered it safely to future generations.").

To find otherwise is contrary to the text of the Establishment Clause and to this Court's Establishment Clause jurisprudence. The coercion test ensures religious liberty. It protects observers from the perils that our Framers sought to protect against, government acts that forced citizens to observe religious acts and/or financially support particular religions. At the same time, it respects the best of our traditions and accommodates a 200-year "tolerable acknowledgement of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792. As Jefferson once wrote, "it does no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."[15]

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[15] Thomas Jefferson, 1743-1826, "Notes on the State of Virginia," Query XVII, *available at* http://etext.virginia.edu/etcbin/toccer-new2?id=JefVirg.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=17&division=div1 (last visited July 24, 2013).

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests that this Court reverse the decision below.

Respectfully submitted,

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August 1, 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-696

In the Supreme Court of the United States

TOWN OF GREECE, NEW YORK,
Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE SOUTHERN BAPTIST CONVENTION ETHICS & RELIGIOUS LIBERTY COMMISSION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

Amicus The Ethics & Religious Liberty Commission ("ERLC") is the public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with about 16 million members in over 45,000 local churches.

Southern Baptists care about citizen participation in government, from City Hall to Congress. A section in the SBC statement of faith says: "Every Christian should seek to bring industry, government, and society as a whole under the sway of the principles of righteousness, truth, and brotherly love ...." [2]

Southern Baptists care about religious liberty and freedom of conscience. Another section in the statement of faith says: "God alone is Lord of the conscience... Church and state should be separate... A free church in a free state is the Christian ideal...."

Baptists believe that God grants religious freedom as a fundamental human right, and Government should recognize it, as in our First Amendment. The

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[1] No counsel of a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief under Sup. Ct. R. 37.2. (blanket consents filed June 5 and 12, 2013).

[2] *Baptist Faith and Message*, 2000, Articles XV, XVII at Appendix 1a, 2a. *See* http://www.sbc.org/bfm/bfm2000.asp

Constitution's safeguard for religious liberty provides a legal environment that fosters freedom to exercise individual conscience in matters of religious faith.

The Ethics & Religious Liberty Commission exists to help churches understand the moral demands of the gospel, to apply Christian principles to moral and social problems and questions of public policy, and to promote religious liberty in cooperation with the churches and other Southern Baptist entities. ERLC has offices at Leland House on Capitol Hill in Washington, DC, and in Nashville, Tennessee. Dr. Russell D. Moore is President.

Your *amicus* is concerned about the Establishment test applied by the Second Circuit that a town's selection process for legislative invocations must "result in a perspective that is substantially *neutral* amongst creeds." (*emph. added*) Such a vague, subjective, unworkable "neutrality" test makes judges the "prayer police," called to scrutinize the content of legislative prayers. This task threatens the religious liberty of participants in civic councils. It also threatens to sink judges in a quagmire of endless litigation over prayer parsing, a job beyond their judicial competence and constitutional powers. Your *amicus* asks this Court to reverse the Second Circuit and to affirm the summary judgment in favor of the Town entered by the trial court.

SUMMARY OF THE ARGUMENT

Judges cannot parse the content of invocations given prior to legislative meetings. Content is reviewed only if the speaker exploits the invocation opportunity

for proselytizing or disparagement of another faith. *See Marsh v. Chambers*, 463 U.S. 783, 794–5 (1983). A speaker's invocation may express a religious point of view, but the government's action in allowing an invocation amounts to a "tolerable acknowledgment of beliefs widely held" concerning the solemnizing of a meeting with an appeal to Providence. *Id.*

Where a prayer may be made publicly, regulation of that prayer's content would violate the Establishment Clause by imposing a state-defined orthodoxy of "neutrality," an imposition prohibited by *Lee v. Weisman*, 505 U.S. 577, 590 (1992). Under such orthodoxy, judges determine the terms and phrases that may (or may not) be used to refer to deities and even which deities may (or may not) be addressed. This is a false, hostile "neutrality" that categorically excludes religions that use prohibited terms, violating the right of all persons to be treated equally by the government, regardless of religious belief.

The Second Circuit, below, notes these sensitive issues, but bluntly deems the prayers offered for the Town of Greece as too Christian for the state orthodoxy to allow. *See Galloway v. Town of Greece*, 681 F.3d 20, 31 (2d Cir. 2012). Worse, it calls for government to manufacture a process that results in public "perspective of substantial neutrality" between differing faiths, *id.* at 31, even when no relevant person actually holds such differing beliefs in the community, *id.* at 33 n.9. This converts the tolerable acknowledgement of a speaker's belief (approved by *Marsh*) into a show of the beliefs that are tolerable to the state's orthodoxy (prohibited in *Lee*).

In the legislative meeting context, an invocation is not a government message. It joins a small number of instances where government may allow religious exercises (such as military chaplains), because the context cures any concern about establishment. Even if the prayer were a government message, the Establishment Clause does not require (and the Free Exercise Clause does not permit) judges to evaluate these prayers for "neutrality." Courts must allow a speaker to invoke Providence according the speaker's conscience, using personal beliefs – or lack thereof. This Court should reinforce the freedom to pray according to the dictates of conscience, a freedom inherent in this Court's opinion in *Marsh v. Chambers*.

ARGUMENT

1. An invocation given by an unpaid "chaplain" at the opening of a meeting of a legislative or deliberative body is not an Establishment of Religion, because a non-government speaker is in a limited public forum.

A. Prayer by a chaplain is not government speech.

Americans have long recognized that invocations at legislative meetings – even when they open the meeting, and use religious language – are not, without more, the words of the government. In September 1774, John Adams wrote to his wife about a debate before the Continental Congress, a debate that is not very different from the one before this Court:

> When the Congress first met, Mr. Cushing made a motion that it should be opened with prayer. It was opposed by Mr. Jay, of New York, and Mr. Rutledge, of South Carolina, because we were so divided in religious sentiments, some Episcopalians, some Quakers, some Anabaptists, some Presbyterians, and some Congregationalists, that we could not join in the same act of worship. Mr. Samuel Adams arose and said he was no bigot, and could hear a prayer *from a gentleman of piety and virtue*, who was at the same time a friend to his country .... therefore he moved that Mr. Duche, an

> Episcopal clergyman, might be desired to read prayers *to the Congress*, tomorrow morning.[3]

In 1854, the House Judiciary Committee also rejected the idea that chaplains were praying a state message at the opening of legislative sessions. Like Adams, the Committee understood the prayers were made *in* Congress, but were not prayers *of* Congress:

> If there be a God who hears prayer ... there never was a deliberative body that so eminently needed the fervent prayers *of righteous men* as the Congress .... If wisdom from above ... be given in answer to the prayers *of the pious*, then Congress need those devotions, as they surely need to have their views of personal importance daily chastened ....[4]

Like Samuel Adams in 1774, the 1854 House report recognized that invocations speak to the government, from outside the government. Invocations do not exist to affirm the state or its views of religion; they frequently proclaim other, eternal kingdoms, apart from this temporal government. Early chaplains

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[3] Charles Francis Adams, *Familiar Letters of John Adams and his Wife, Abigail Adams, During the Revolution* 37-8 (1876) (emph. added)(letter of September 16, 1774), quoted in 1 Anson Stokes, *Church and State in the United States 449* (1950).

[4] *Chaplains in Congress and in the Army and Navy*, H.R. Rep. No. 124, 33rd Cong., 1st Sess. (1854) (emph. added), quoted by 2 Robert C. Byrd, *The Senate 1789-1989* 301 (1980).

attacked Congress' lack of respect for the sabbath,[5] and delivered repeated "insults" to the body during services organized by the chaplaincy.[6]

B. *Marsh* judged the context, not the content of prayers.

Thus, this Court's opinion in *Marsh v. Chambers*, 463 U.S. 783 (1983), joined a long-standing affirmation that an invocation at a deliberative assembly, even by a compensated clergyman,[7] "is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the

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[5] 2 Robert C. Byrd, *The Senate 1789-1989* 301 (1980) (describing Chaplain John Brackenridge's attack on Congress's violation of Sabbath in 1814).

[6] 1 Anson Stokes, *Church and State in the United States 499-505* (1950) (describing various "insults" to the government delivered at Sunday services in the House chambers, then organized by the chaplain.) *Cf. Snyder v. Murray City Corp.*, 159 F.3d 1227, 1229 (10th Cir. 1998) (even a "political harrangue" would not lose prayerful character).

[7] Your amicus notes that Baptists have faithfully questioned the practice of paying legislative chaplains from the public fisc (and continue to do so), but having the office is not an establishment, so long as the chaplain speaks his or her conscience. *See, e.g.*, John Leland, *Writings of the Late Elder John Leland* 118 (L.F. Greene ed., 1845) ("If legislatures choose to have a chaplain, for Heaven's sake, let them pay him by contributions, and not out of the public chest.")

people of this country."[8] The tradition is part of the "fabric" of the Nation.[9]

The ruling in *Marsh* depended on context, not content. "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." [10] In a legislative meeting – be it Congress, a state legislature, or a town council – single speakers do not convey a government message. At the federal level, the Constitution grants wide latitude to decisions by legislators concerning the scope of debates.[11] In lesser deliberative meetings, Americans recognize the deeply ingrained ideal that the cure for disagreement is more speech, not less. So, without judicial requirements, congressional chaplains have long tried to accommodate requests from other religious (and non-religious) voices.[12] And Respondents in this case have "expressly abandoned the argument that [Petitioner] intentionally discriminated against non-Christians in its selection of prayer-givers[,]" because the Town allows any citizen to give an invocation.[13]From the

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[8] *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

[9] *Id.*

[10] *Id.* at 794–5.

[11] *See* U.S. Const. Art. 1, § 6, cl. 1.

[12] 2 Robert C. Byrd, *The Senate 1789-1989* 305 (1980) (congressional chaplain arranges numerous 'guest' chaplains).

[13] *Galloway*, 681 F.3d at 26 and 31.

Founding to the present, it has been neither bigotry nor an establishment of religion in the United States to allow invocations to be given according to the speaker's conscience.

The Second Circuit, below, errs by judging the invocation speech using tests outside the deliberative-body context. This context is starkly different from those involving displays of the Ten Commandments, or even graduation prayers, which some claim erroneously, in our opinion, place the government in a position of adopting a particular message. In legislative debates, no person familiar with our traditions can assume that a single speaker is offering the "official" view. Surely, no other speaker at a council meeting requires a disclaimer about the ownership of his views. The context of legislative prayers, like the context of military chaplains, prevents any reasonable observer from presuming state sponsorship or endorsement of the speaker's message. Thus, the Second Circuit errs in attempting to regulate the content of invocations to avoid the perception of affiliation with the state.

C. A limited public forum establishes freedom of speech, not affiliation with religious viewpoint.

This Court's doctrine protecting free speech from censorship in a limited public forum provides an additional ground for upholding legislative prayer. These prayers were offered by private citizens—as opposed to paid chaplains in a limited public forum created by government for the lawful purpose of acknowledging the beliefs of the community, and solemnizing the work of the legislature. The Second

Circuit did not address this issue, and instead engaged in a content-based analysis of the legislative prayers without regard to the free-speech rights of the private citizens praying, implicitly assuming that the prayers of private citizens must be attributed to the state. Thus, the Second Circuit created a test that burdens private prayer-givers' free-speech rights. The Second Circuit's approach overlooks the "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990).

This Court has repeatedly recognized that "a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009) (citing *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 46, n.7 (1983)); *see Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (forum limited to student groups). That is the case here: the Town opened a forum for legislative prayers at Town Board meetings in which any private citizen could participate; the prayers offered in that forum were therefore a form of constitutionally protected speech.

When the government allows religious speech in a public forum, it does not endorse any or all messages or establish religion. It establishes freedom. There is no tacit imprimatur of state approval on one or all speakers. *Id.* at 274-275. Although the Second Circuit discounted the effectiveness of disclaimers of endorsement, this Court has often suggested this

method for governments which are concerned about public misunderstanding. Disclaimers are almost always to be preferred over discrimination against speakers due to religious content of their speech. *Id.* at 275, n. 14. As mentioned above, no disclaimer is necessary in this case because no exploitation of the prayer opportunity has occurred by these non-government speakers.

2. A court cannot require a "perspective that is substantially neutral amongst creeds" without unconstitutionally comparing the content of the prayer with a state-established concept of neutrality.

Given the history and context of legislative prayers, the Second Circuit goes too far in attempting to regulate the speaker's exercise of speech and religion in legislative meetings. The lower court believes it improper for an individual's speech to "convey their views of religious truth ..."[14] and says constitutionality depends on a process that *results* in "a perspective that is substantially neutral amongst creeds."[15] This would convert private speech and religious exercise into government speech, using a civil religion that is offensive to many citizens, including many Baptists.

This Court has long recognized that the judiciary is not competent to decide theological matters for

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[14] *Galloway*, 681 F.3d at 34.

[15] *Id.* at 31.

believers. Justice Miller's writing for the Court in 1871, noted:

> In this country, the full and free right to entertain any religious belief ... is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect .... It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith ... as the ablest men in each are in reference to their own. [16]

Furthermore, this Court noted in *Lee v. Weisman* that the government's requiring religiously "neutral" prayers would be tantamount to "compos[ing] official prayers."[17]

Yet, in the case below, the Second Circuit tasks government officials with the Constitutionally impossible task of balancing competing theologies so as to create a "perspective that is substantially neutral amongst creeds."[18] It cautions that a "single circumstance" [19] by a person who "convey[s] their views of religious truth" can result in an unconstitutional

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[16] *Watson v. Jones*, 80 U. S. 679, 728-9 (1871).

[17] *Lee v. Weisman*, 505 U.S. 577, 588 (1992) (*quoting Engel v. Vitale*, 370 U.S. 421, 425 (1962))

[18] *Galloway*, 681 F.3d at 31.

[19] *Id.* at 34.

practice.[20] Thus, something more than absolutely impartial selection may be required, especially if there is insufficient religious diversity in the community to satisfy the government.[21]

Governments must conclude, as the Second Circuit plainly hopes they will, that legislative prayer is full of "difficulties"[22] requiring active balancing by government in order to avoid judicial scrutiny. If a speaker references a "sectarian" term for God, or states non-neutral attributes, or references a specific divinity *in a single circumstance,* the prayer selection process must be altered to render the required "neutral" perspective. [23] Thus, judges become the arbiters of this new orthodoxy of "neutrality," setting standards by which deities may be addressed in public prayers.

Of course, such impulses have existed for almost as long as prayers have been given. King Darius, the Mede, was also concerned about civic religion in an ancient incident involving the prayers of government employees and a den of lions. *See* Daniel 6:1, *et seq*. There, too, public prayers were allowed, if directed to the government's watered-down deity. *Id.* It is a questionable improvement that the Second Circuit

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[20] *Id.*

[21] *Id.*at 33 n.9.

[22] *Id.* at 34.

[23] *Id.*

would punish prayers to the wrong gods by casting officials into a mere den of lawyers. *Cf.* Daniel 6:12. [24]

However, there is no reason to suppose modern American judges are any improvement over ancient kings in identifying, measuring and balancing religious creeds. Can the town council determine that it has neutralized a Catholic prayer with a Baptist prayer? Apparently not, as the Second Circuit makes no such analysis below. Can an imam neutralize a Christian prayer, even though Islam reveres Christ as a prophet? Or does true neutralization require an atheist or pagan invocation? Is the Seventh Day Adventist's position on Christ the relevant factor for offset, or is it the belief, shared with Judaism, that God's Sabbath is on Saturday? Do the offsets require equal ratios? The lower court says absolute impartiality in selection may not be enough.[25] Thus, the test requires government officials to identify religious doctrines, to determine where the doctrines differ, to measure the degree of those differences, and then to harmonize them in a neutral presentation. If an offsetting believer cannot be found, governments must find someone willing to give the "neutral" opinion.[26] Every step requires a judge to make theological decisions that should be made by individuals.

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[24] This Court's rules *are* an improvement; furious with the crisis caused by the overbroad rule on public prayer, Darius eventually remanded his judges to the den. *Cf.* Daniel 6:24.

[25] *Galloway*, 681 F.3d at 33 n.9.

[26] *Id.* at 31.

No judge can, or should, make such decisions. *Watson*, 80 U.S. at 729. As Justice Souter observed, "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible" than "comparative theology." [27]

Yet these difficulties are not hypothetical. Standards adopted in several circuits now allow prayer to be studied for "neutrality." [28] The courts have been totally unable to develop workable definitions of "nonsectarian" or "neutral."[29] In addressing this issue, the Eleventh Circuit correctly notes: "[w]hether invocations of 'Lord of lords' or 'the God of Abraham, Isaac, and Mohammed' are 'sectarian' is best left to theologians, not courts of law."[30]

3. Every prayer expresses a particular religious viewpoint and is therefore not "neutral" as to religion.

A newly-established 'neutral' orthodoxy would necessarily favor some religions and offend others, because *every* prayer adopts or presupposes particular

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[27] *Lee*, 505 U.S. at 616–17 (Souter, J., concurring).

[28] *See Joyner v. Forsyth Cnty.*, 653 F.3d 341 (4th Cir. 2011); *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006); *Snyder v. Murray City Corp.*,159 F.3d 1227 (10th Cir. 1998)

[29] *See Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1272 (11th Cir. 2008).

[30] *Id.* at 1267.

religious beliefs or viewpoints. This "neutrality" or "toleration" is offensive to true religious freedom. Early American Baptist John Leland observed in his 1820 Short Essays on Government:

> Government should protect every man in thinking and speaking freely, and see that one does not abuse another. The liberty I contend for is more than toleration. The very idea of toleration is despicable; it supposes that some have a pre-eminence above the rest to grant indulgence; whereas all should be equally free, Jews, Turks, Pagans and Christians. Test Oaths and established creeds should be avoided as the worst of evils.[31]

More recently, Kenneth Klukowski observed that many religions are excluded by such limitations, causing an "Establishment Clause train wreck." He writes:

> Not all religions are monotheistic. For religions involving multiple gods and/or goddesses, a rule requiring that the prayer giver refrain from naming a deity precludes the offering of a prayer in their normal faith tradition. Second, there are Christian denominations whose doctrinal statements require that prayers invoke the name of Jesus Christ. ...

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[31] John Leland, *Virginia Chronicle*, in *Writings of the Late Elder John Leland* 118 (L.F. Greene ed., 1845), *quoted by* 1 Anson Stokes, *Church and State in the United States* 355 (1950).

> A rule prohibiting the naming of a particular deity, then, categorically excludes certain religions, and in so doing violates the Establishment Clause. If the Establishment Clause prohibits the government from doing anything, it prohibits categorically barring the adherents of certain faiths from participating in public events on equal terms with followers of other religions. The government cannot make violating any citizen's religious faith a condition precedent to equal treatment.[32]

When this Court convenes with a simple prayer, "God save this honorable court" it makes specific religious statements that are in accord with some religious beliefs and in conflict with others. Far from being "neutral" as to religious belief, this prayer presupposes a personal God who hears and answers prayer, who intervenes in history, and who has the power to "save this honorable court." These presuppositions are rejected by polytheistic beliefs, which believe in gods instead of a God; by deistic beliefs, which reject the idea that God intervenes in history or responds to prayer; and by atheistic beliefs, which reject the existence of a god or gods altogether.

In *Kerr v. Farrey* The Seventh Circuit discussed the logical problem inherent in attempting to understand any prayer as "neutral" as to religion:

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[32] Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 Geo.J.L. & Pub. Pol'y 219, 254–55 (2008).

> The district court thought that the [Narcotics Anonymous] program escaped the "religious" label because the twelve steps used phrases like "God, as we understood Him," and because the warden indicated that the concept of God could include the non-religious idea of willpower within the individual. We are unable to agree with this interpretation. A straightforward reading of the twelve steps shows clearly that the steps are based on the monotheistic idea of a single God or Supreme Being. True, that God might be known as Allah to some, or YHWH to others, of the Holy Trinity to still others, but the twelve steps consistently refer to "God, as we understood Him." Even if we expanded the steps to include polytheistic ideals, or animalistic philosophies, they are still fundamentally based on a religious concept of a Higher Power. ... Because that is true, the program runs afoul of the prohibition against the state's favoring religion in general over non-religion.[33]

Theistic presuppositions also conflict with certain forms of Buddhism that reject the notion of a personal creator God.[34]

The distinction between monotheistic religious beliefs and other religious beliefs undermines the idea that references to "God" in the generic do not "advance"

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[33] *Kerr v. Farrey*, 95 F.3d 472, 479–80 (7th Cir. 1996).

[34] Ninian Smart, *Dimensions of the Sacred: An Anatomy of the World's Beliefs* 27 (1996).

one form of religious belief or "disparage" another. Indeed, with the multitude of religious beliefs in the United States, it is impossible to craft any prayer that comports with the fundamental beliefs of them all. Demanding that legislative invocations be of this fictional "neutral" form is to ban them altogether or to adapt to the state orthodoxy of "neutrality."

Finally, forcing prayer to conform to a state orthodoxy of "neutrality" discriminates against those religious beliefs that require prayer in a form prohibited by that "neutrality." If praying "in Jesus' name" is prohibited, then those who believe they must pray "in Jesus' name" are effectively prohibited from being able to participate in a legislative prayer because their religious views conflict with those of the state. As this Court said in *Lee v. Weisman*, "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights or benefits as the price of resisting conformance to state-sponsored religious practice."[35]

The Second Circuit recalled Justice Goldberg's admonition about the concept of neutrality in *Abington v. Schempp*:

> [U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but

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[35] *Lee*, 505 U.S. at 596.

> of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it. [36]

Justice Burger also recognized the dangers of a brooding secularism masquerading as "neutrality"—a "hostile neutrality," if you will. He counseled in *Walz* that the "play between the joints" in the Religion Clauses was better thought of as "benevolent neutrality."

> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts, there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. [37]

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[36] *Abington School District v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

[37] *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970).

Accommodating diverse prayer-givers is benevolent neutrality. Banning all prayer-givers for the sake of avoiding offense, or mandating a watered-down civil religion to take the place of the Kingdom of God and our Constitutionally-guaranteed freedom of religion according to the dictates of conscience – this is malevolent neutrality. The result is the same as religious hostility—a naked public square, devoid of religious freedom.

In the same vein, Prof. Stephen L. Carter notes, "the more that a nation chooses to secularize the principal contact points between government and people ... the more it will persuade many religious people that a culture war has indeed been declared, and not by the Right." [38]

CONCLUSION

In our American public meetings, we are no bigots, and can hear a prayer from a person of piety and virtue, who is at the same time a friend to his country.

New attempts to promote "civic religion" or "religious neutrality" must establish the judiciary as the arbiters of the "neutral" orthodoxy. These necessarily favor some religions over others.

The only way to avoid this establishment of religion and to remain truly neutral is to follow the guidance of *Marsh*. The Eleventh Circuit Court of Appeals adopted

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[38] Stephen L. Carter, *God's Name in Vain: The Wrongs and Rights of Religion in Politics* 2 (2000).

this principle of freedom of conscience in *Pelphrey v. Cobb County*.[39] Unfortunately, three other circuits have adopted a civic orthodoxy, where government may replace individual conscience.[40]

The Second Circuit Court of Appeals has now gone farther, creating an especially pernicious hostile "neutrality," hinting that the Town of Greece might need to manufacture religious diversity for any citizen to give one of the invocations at regular meetings. Trying to create "neutral" invocations at legislative meetings harms the Free Exercise rights of the religious person. A person wishing to give an invocation must be able to pray according to the dictates of that person's conscience without the prayer police scrutinizing the content of the prayer.

This Court should reverse the Second Circuit, affirm the judgment of the trial court in favor of the Petitioner, and reaffirm simple truth of *Marsh*, that prayer by the governed for their government does not establish religion, but establishes freedom: "to secure the blessings of liberty for ourselves and our posterity." *U.S. Const. Preamble*.

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[39] *See Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1272 (11th Cir. 2008).

[40] *See Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011); *Hinrichs v. Bosma*, 40 F.3d 393 (7th Cir. 2006); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1236 (10th Cir. 1998)(permitting regulation of prayer by an "agent" of government).

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Baptist Faith and Message, 2000
Article XV
The Christian and the Social Order

All Christians are under obligation to seek to make the will of Christ supreme in our own lives and in human society. Means and methods used for the improvement of society and the establishment of righteousness among men can be truly and permanently helpful only when they are rooted in the regeneration of the individual by the saving grace of God in Jesus Christ. In the spirit of Christ, Christians should oppose racism, every form of greed, selfishness, and vice, and all forms of sexual immorality, including adultery, homosexuality, and pornography. We should work to provide for the orphaned, the needy, the abused, the aged, the helpless, and the sick. We should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death. Every Christian should seek to bring industry, government, and society as a whole under the sway of the principles of righteousness, truth, and brotherly love. In order to promote these ends Christians should be ready to work with all men of good will in any good cause, always being careful to act in the spirit of love without compromising their loyalty to Christ and His truth.

Baptist Faith and Message, 2000
Article XVII
Religious Liberty

God alone is Lord of the conscience, and He has left it free from the doctrines and commandments of men which are contrary to His Word or not contained in it. Church and state should be separate. The state owes to every church protection and full freedom in the pursuit of its spiritual ends. In providing for such freedom no ecclesiastical group or denomination should be favored by the state more than others. Civil government being ordained of God, it is the duty of Christians to render loyal obedience thereto in all things not contrary to the revealed will of God. The church should not resort to the civil power to carry on its work. The gospel of Christ contemplates spiritual means alone for the pursuit of its ends. The state has no right to impose penalties for religious opinions of any kind. The state has no right to impose taxes for the support of any form of religion. A free church in a free state is the Christian ideal, and this implies the right of free and unhindered access to God on the part of all men, and the right to form and propagate opinions in the sphere of religion without interference by the civil power.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
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SEP 23 2013
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In The
Supreme Court of the United States

TOWN OF GREECE, PETITIONER,

v.

SUSAN GALLOWAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR UNITARIAN UNIVERSALIST ASSOCIATION OF CONGREGATIONS, UNION FOR REFORM JUDAISM, MUSLIM ADVOCATES, HINDU AMERICAN FOUNDATION, NATIONAL COUNCIL OF JEWISH WOMEN, CENTRAL CONFERENCE OF AMERICAN RABBIS, WOMEN OF REFORM JUDAISM, BLUE MOUNTAIN LOTUS SOCIETY, AND RABBI SIMEON KOLKO AS AMICI CURIAE SUPPORTING RESPONDENTS

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BRIEF FOR UNITARIAN UNIVERSALIST ASSOCIATION OF CONGREGATIONS, UNION FOR REFORM JUDAISM, MUSLIM ADVOCATES, HINDU AMERICAN FOUNDATION, NATIONAL COUNCIL OF JEWISH WOMEN, CENTRAL CONFERENCE OF AMERICAN RABBIS, WOMEN OF REFORM JUDAISM, BLUE MOUNTAIN LOTUS SOCIETY, AND RABBI SIMEON KOLKO AS AMICI CURIAE SUPPORTING RESPONDENTS

The Unitarian Universalist Association of Congregations, Muslim Advocates, the Union for Reform Judaism, the National Council of Jewish Women, the Central Conference of American Rabbis, Women of Reform Judaism, the Hindu American Foundation, the Blue Mountain Lotus Society, and Rabbi Simeon Kolko respectfully submit this brief as amici curiae in support of respondents.[1]

INTEREST OF AMICI CURIAE

The **Unitarian Universalist Association of Congregations** is a religious organization that combines two traditions: the Universalists and the

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[1] Letters from the parties granting blanket consent to the filing of amicus curiae briefs have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Unitarians. Both groups trace their roots in North America to the early Massachusetts settlers and to the founders of the Republic. Unitarian Universalism is a liberal religion with Jewish-Christian roots. It has no creed. It affirms the worth of human beings, advocates freedom of belief and the search for advancing truth, and tries to provide a warm, open, supportive community for people who believe that ethical living is the supreme witness of religion.

The **Union for Reform Judaism**, whose 900 congregations across North America include 1.3 million Reform Jews, the **Central Conference of American Rabbis**, whose membership includes more than 2,000 Reform rabbis, and the **Women of Reform Judaism**, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue out of our longstanding commitment to the principle of separation of church and state, believing that the First Amendment to the Constitution is the bulwark of religious freedom and interfaith amity. The concept of separation of church and state has lifted up American Jewry, as well as other religious minorities, providing more protections, rights and opportunities than have been known anywhere else throughout history.

Muslim Advocates works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates envisions a world in which equality, liberty, and justice are guaranteed for all, regardless of faith, and in which

the Muslim American legal community is vital to promoting and protecting these values. In pursuit of this vision, Muslim Advocates' mission is to promote equality, liberty, and justice for all by providing leadership through legal advocacy, policy engagement, and civic education, and by serving as a legal resource to promote the full and meaningful participation of Muslims in American public life.

The **National Council of Jewish Women** is a grassroots organization of volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, the National Council of Jewish Women strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms.

The **Hindu American Foundation** (HAF) is an advocacy organization for the Hindu American community. The Foundation educates the public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with HAF's objectives. HAF focuses on human and civil rights, public policy, media, academia, and interfaith relations. Through its advocacy efforts, HAF seeks to cultivate leaders and empower future generations of Hindu Americans. Since its inception, HAF has made legal advocacy one of its main areas of focus. From issues of religious accommodation and religious discrimination to defending fundamental constitutional rights of free exercise and the separation of church and state, HAF has educated Americans at large and the courts about

various aspects of Hindu belief and practice in the context of religious liberty, either as a party to the case or an amicus curiae.

The **Blue Mountain Lotus Society** offers a unique and dynamic approach to an engaged contemporary Buddhist community. The primary service of the Blue Mountain Lotus Society is to educate and facilitate individual practitioners and communities in the Dharma, the way of Mindful Living.

Simeon Kolko is a Rabbi, educator, and diversity consultant living in Rochester, New York, in the vicinity of the Town of Greece. During recent years, Rabbi Kolko has counseled several families living in Greece, New York about their sense of estrangement from the majority culture. He is currently serving as the Rabbi of the Jewish Center of Jackson Heights. Rabbi Kolko was ordained by the Jewish Theological Seminary in 1998. He has long been involved in interfaith dialogue and is deeply committed to bringing together those of disparate beliefs around a set of core values.

INTRODUCTION AND SUMMARY OF ARGUMENT

One's religious belief, or nonbelief, should be irrelevant to one's access to the political process. But if petitioner's arguments were accepted, citizens who wish to participate in their local governments could be forced to accede to overtly sectarian prayers that are not a part of their own faith tradition. Nothing would prevent local governments across the country from sponsoring prayers that ostracize religious minorities. It would be acceptable for local governments to invite prayer givers to offer prayers invoking specific Christian names for God, asking for forgiveness for sins, and proselytizing. Attendees could be asked to stand and participate in the religious ceremony by bowing their heads and saying "amen." But members of minority religious faiths should not be forced to participate in another faith's religious observance just to attend a local-government meeting.

Overtly sectarian prayers at local-government meetings sends an unmistakable message that adherents to minority faiths are outsiders, not full participants in the political sphere. These prayers ostracize citizens from their own communities. Indeed, members of minority faiths have experienced significant harassment, property damage, and even threats of violence simply for opposing participation in overtly Christian invocations sponsored by the local government.

Moreover, although the opportunities to offer sectarian prayers theoretically may be open to all religions, it is not that way in practice. When adherents to minority faiths have tried to take advantage of purportedly open forums for sectarian prayer at local-government meetings, they often have been harassed or their requests have been denied for fear of offending the religious majority. In other words, sectarian prayer is not even-handed and open to all; in reality, it often is good for one group only, and that group is the religious majority.

A rule prohibiting sectarian prayer before local-government meetings would preclude these harms. But not only would such a rule protect religious minorities, it also would protect members of the majority faith. Demographic changes indicate that today's religious majority, Christians, may not always be the majority. Indeed, demographic data confirm that minority religious faiths and adherents to no religion are growing rapidly, while Christian adherents are aging and their share of the population is declining. There are communities within the United States today with a majority or plurality population of Jewish or Muslim adherents. The rule proffered by respondents protects the national religious majority in those areas where they are minorities—areas that will grow over time.

Finally, contrary to the arguments of one amicus, there is no sound legal basis to challenge respondents' standing to sue. Respondents are personally and directly affected by the challenged conduct.

ARGUMENT

I. OVERTLY SECTARIAN PRAYER BEFORE LOCAL-GOVERNMENT MEETINGS HARMS MEMBERS OF MINORITY RELIGIOUS FAITHS

A. Sectarian Legislative Prayer At Local-Government Meetings Forces Religious Participation On Citizens Wishing Only To Participate In Democracy

1. Members of minority religious faiths are not supposed to be second-class citizens. Jews, Muslims, Hindus, Buddhists, and other followers of minority religious faiths have the same rights and civic duties as Christians to participate in government at all levels. Nor are religious minorities niche groups. Members of minority faiths or individuals of no faith now account for approximately a quarter of the population. *Infra* pp. 17-19.

But in state- and local-government meetings preceded by sectarian prayer, individuals' rights of participation in the government are not unconditional. Rather, those rights are conditioned on participants' willingness to abide an overtly sectarian message—nearly always Christian—at the behest of a government official.

Consider, for example, a Jewish man wearing a yarmulke, or a Muslim woman wearing a hijab, who might wish to be heard about consumer utility rates at the July 17, 2013 meeting of the Alabama Public Service Commission. To participate at that public

meeting, the citizen would have had to endure several minutes of a Commission-endorsed prayer effectively telling the citizen that his or her faith was false.

The prayer is documented in a video posted on the Alabama Public Service Commission's website. Alabama Public Service Commission, *APCO July 2013* (July 17, 2013), http://www.psc.state.al.us/administrative/Jul172013.htm. It begins with Commission President Twinkle Andress Cavanaugh explaining that "as is customary," the meeting will begin with a prayer from a member of a local church or a friend of a commissioner. In a lengthy introduction, President Cavanaugh introduced the prayer giver, John Delwin Jordan, as "a dear friend" and "role model," who "will be leading us in prayer." She explained that Mr. Jordan is an active member of a local Baptist church and of Promise Keepers and has gone on 10 mission trips. She gave the audience Mr. Jordan's email address and encouraged the audience members to sign up for Mr. Jordan's weekly emails, which she said "will challenge you to walk closer with our creator." She then asked everyone to "stand and join us in prayer," and turned the floor over to Mr. Jordan.

Mr. Jordan had the floor for over four minutes. He began by asking "for a show of hands to see how many people believe in prayer" and "believe that God answers prayers." Each person visible in the video raised his or her hand. After the audience collectively bowed their heads, Mr. Jordan's prayer began. He "pray[ed], Holy Spirit, that you will fall fresh on us"

and "Father, that you will send spiritual rain upon each one of us." Mr. Jordan's prayer continued: "Father, your word says that if any of us thirst, let us drink of the water, and, Jesus, we know that you're the living water, and if we drink of you, we will not thirst again." At one point, the prayer turned political: "Father, we've turned so far from you. We've sinned against you and you alone. * * * God, we've taken you out of our schools. * * * We've murdered your children. We've said it's okay to have same-sex marriage, God. We have sinned. And we ask once again that you'll forgive us of our sins." The prayer concluded by invoking Jesus' name: "the powerful, most mighty name, the name that's above all names, and that's Jesus." Mr. Jordan then asked the audience to assent to the prayer by saying "amen."

Amici's members wishing to participate in the political process in Alabama or in Greece, New York should not be forced to sit through or participate in the observance of another faith. Their religious beliefs should be irrelevant to their participation in government meetings.

2. Sectarian prayer at local-government meetings may be more deleterious than at national or state legislature sessions. Social pressure to participate in or otherwise respect the prayer is much greater at local meetings than when the prayer is given before a national or state legislature. Local-government meetings often are very small and attended by one's neighbors, friends, and business associates. Remaining seated while everyone else

stands and participates in the Christian prayer singles out and subjects oneself to being ostracized by one's neighbors. The pressure that individuals feel to stand and participate in the Christian observance thus may be overwhelming. Indeed, many individuals who have dissented from the majority prayer have faced threats of physical violence. *See infra* pp. 11-13.

It is not an answer to say that by standing and remaining silent during the prayer, minority-faith adherents are not actually participating in the religious observance. "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices * * * may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

Nor is it adequate to say that attendance at such meetings is voluntary, and that the prayers may be avoided by not attending the meeting. As a factual matter, that is untrue. Unlike in national legislatures, individual citizens often have to participate directly in city or town council meetings to conduct important business. For example, in Greece, residents seeking to open many types of businesses such as restaurants must, by law, appear in person at one or more Board meetings. Resp'ts' Br. 5-6.

In any event, citizens who adhere to a different faith should not have to choose between, on the one

hand, participating at the public government meeting that includes an overtly Christian observance and, on the other, not participating in the government meeting at all. As Thomas Jefferson insisted, "our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry," and "opinions in matters of religion * * * shall in no-wise diminish, enlarge, or affect [our] civil capacities." Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1779), *reprinted in Epoch-Making Liberty Documents* 103 (David Wuntch ed., 1936).

B. Religious Minorities Face Ostracism And Harassment For Not Participating In The Majority's Sectarian Prayer

1. Not only are members of minority religious faiths ostracized from the political process by overtly sectarian legislative prayer, they also face enormous backlash for speaking out or refusing to participate. Indeed, many individuals have been met with derision, exclusion, threats, and actual violence.

One need only consider the harassment and vitriol unleashed on respondents here. After instituting this suit, the respondents received anonymous, threatening letters warning them to "be careful." Greg Stohr, *"Let Us Pray" Before Town Council Becomes High Court Case*, Bloomberg News (July 26, 2013).[2] As the suit continued, respondent Linda

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[2] http://www.bloomberg.com/news/2013-07-26/let-us-pray-before-town-council-begins-is-high-court-case.html.

Stephens awoke one morning to discover that her mailbox had been pulled out of the ground, smashed, and placed on top of her car. *Ibid.*

Other individuals who have dared to question Greece's public-prayer practice have been greeted by similar harassment. Nancy Braiman, who filed a complaint with the American Civil Liberties Union after encountering overtly sectarian Christian prayer at a Greece Town Board meeting, was targeted with an anti-Semitic letter. That letter, sent anonymously, "basically said (Adolf) Hitler should have finished the job exterminating the Jews, and it used a variety of racial slurs and profanity to describe" Braiman. Colleen M. Farrell, *Brighton Police Investigating Hate Mail*, Messenger Post, Feb. 21, 2007, at A1.

Members of the community seeking to intimidate respondents and their supporters also have exploited public forums to make their message plain. One letter to the editor of a local newspaper said that the respondents should, "[w]hen in Rome, do as the Romans." Letter to the Editor, *Saddened by Legal Challenge to Prayer*, Democrat and Chronicle, May 21, 2013.[3] Another letter to the editor described respondents as "God haters" who "demand their 'rights' at the expense of everyone else's." Letter to the Editor, *God Haters Have Invaded Greece*, Democrat and Chronicle, Mar. 30, 2008. This writer explained

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[3] http://www.democratandchronicle.com/article/20130521/OPINION03/305210039/Letter-Saddened-by-legal-challenge-prayer.

that "those who want to pray should be allowed their right to do so, and those who do not, don't have to." *Ibid.*

These instances are not isolated to Greece. Darla Wynne, of Great Falls, South Carolina, objected to her town council's practice of opening meetings with appeals to Jesus Christ. *Wynne v. Town of Great Falls*, 376 F.3d 292, 295 (4th Cir. 2004). In response, Wynne was told that she "wasn't wanted" and that she "should leave town" because she "could possibly be burned out." *Ibid.*

2. One argument often made to support petitioner's position is that sectarian prayer may be offered not only by Christians but by members of minority faiths. While that might be true in theory, it is not in practice. In instances when members of minority faiths have been permitted to give invocations at legislative assemblies, the result often is further ostracism.

Considerable backlash followed the Town of Greece's single prayer by a Wiccan priestess. For example, one citizen urged the Town to abandon legislative prayer altogether, rather than having "to yield the floor to individuals who would make a mockery of [American] history, our culture, and our faith." Letter to the Editor, *Prayers Better Left Unsaid*, Greece Post, May 15, 2008. According to that individual, allowing a Wiccan priestess to lead prayer before the Town Board meeting was "an embarrassment and an outrage to the citizens in the town of Greece."

Ibid. With utter confidence "that our country was founded on a faith in one true God," the individual explained that "it is customary for governmental agencies" to pray to the Christian God, and no other. *Ibid.*

Similar backlash has occurred in other communities. In Hartford, Connecticut, city leaders decided—for just one month—to invite local Muslim imams to perform invocations at the start of city council meetings. *See* Everton Bailey, Jr., *Connecticut Muslims Ask for Equality from City Council*, Associated Press, Sept. 14, 2010; Stephen Clark, *Hartford's Inclusion of Muslim Prayers in Council Meetings Sparks Outrage*, FoxNews.com (Sept. 8, 2010).[4] The city council intended the invitation to Muslim religious leaders to be a "break from the typical start of meetings with Christian prayers, or occasionally an invocation by a rabbi." Clark, *supra*.

But the invitation caused so great an uproar that the city council "cancel[ed] the scheduled prayer in favor of a moment of silence." Bailey, *supra*. One commentator remarked, "If they check their history, we're a Christian nation. * * * I think opening with Islamic prayer is opening up for more people to go straight to hell." Clark, *supra*. And while the city council opted for a more inclusive "moment of silence" for the month of September 2010, the city council

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[4] http://www.foxnews.com/politics/2010/09/08/hartford-councils-inclusion-muslim-prayers-sparks-outrage/.

president "said the plan is to return to the prayer rotation in October." Bailey, *supra*.

Muslim leaders in Connecticut explained that canceling their opportunity to lead public prayer "unfairly singles out state residents who practice Islam." *Ibid.* "We are not asking for special treatment," one leader remarked. *Ibid.* "We are just asking for equal treatment, just like everyone else." *Ibid.* But equal treatment is not a reality for religious minorities, who often face harassment and vitriol when they seek to express that faith in local government life.

An atheist Arizona legislator whose turn it was to give the daily prayer at the Arizona House of Representatives recently took another tack. Representative Juan Mendez asked members not to bow their heads while he spoke about his secular humanist tradition and quoted Carl Sagan. Matthew Hendley, *Atheist State Lawmaker Quotes Carl Sagan Instead of Doing Prayer Before House Session*, Phoenix New Times (May 21, 2013).[5] He later said: "I wanted to find a way * * * where I could convey some message and take advantage of the opportunity that people have when they offer these prayers. * * * If my lack of religion doesn't give me the same opportunity to engage in this platform then I feel kind of disenfranchised." Bob Christie, *Arizona House Non-Prayer*

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[5] http://blogs.phoenixnewtimes.com/valleyfever/2013/05/atheist_carl_sagan_juan_mendez_state_lawmaker_quotes_carl_sagan_instead_of_doing_prayer_before_house_session.php.

Sparks Christian Re-do, KTAR (May 22, 2013).[6] The next day, however, another lawmaker asked other members to join him in a second daily prayer in "repentance." *Ibid.* That lawmaker chided: "if you are a non-believer, don't ask for time to pray." *Ibid.*

3. Overtly sectarian prayer at local-government meetings pits the religious majority against religious minorities. Such prayer marginalizes minority faiths, sending the unmistakable "message to nonadherents that they are outsiders, not full members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

As a result, an enormous toll is exacted on communities' social fabric. In a community setting, individuals ostracized because of their religious beliefs may lose the sense of belonging that binds them to their community in the first place. *See* Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 Nw. U. L. Rev. 1113, 1167-1168 (1988) (exclusion restricts community membership and/or reduces members' loyalty). This is especially so when the exclusion relates to religious beliefs. "[B]ecause these beliefs define the person's very sense of being, the community's action may be viewed as an assault not merely on the person's beliefs, but on the person himself." *Id.* at 1168. As a result, "[h]is loyalty to the community will be weakened, perhaps

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[6] http://ktar.com/?sid=1636340&nid=23.

dramatically, and he may even withdraw from the community altogether." *Ibid.*

That brings about the risk of serious damage to American democracy, particularly at the local level. When religious minorities "banish themselves from the political arena to avoid spiritual stain, they no longer participate in the republican discourse concerning the common good." Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 Iowa L. Rev. 35, 81 (1993). "[T]he ostracism that befalls plaintiffs who challenge cherished governmental endorsements of religion is so extreme that most who are offended by these practices bite their tongues and go about their lives." Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2171 (1996). Yet when fewer citizens participate in the political process, republican government is necessarily less representative.

C. A Rule Prohibiting Sectarian Prayer Before Local-Government Meetings Protects Both The Religious Majority And Religious Minorities

A rule prohibiting sectarian prayer at local-government meetings not only protects members of minority religious faiths, it also protects the current religious majority.

1. The current religious majority is dwindling. Demographic data show that while Christian adherents today constitute a clear majority of Americans, their

share of the total U.S. population has declined in recent decades. Between 1990 and 2008, the share of Americans identifying as Christians dropped from eighty-six percent to seventy-six percent. Barry A. Kosmin & Ariela Keysar, American Religious Identification Survey: Summary Report 3 (2009).[7] In California, non-Catholic Christians decreased from nearly fifty percent of the population in 1990 to just thirty-five percent of the population in 2008. *Id.* at 17. "The historic Mainline Christian churches have consistently lost market share since the 1950s, but since 2001 there has been a significant fall in numbers." *Id.* at 6. The population of American Muslims has doubled in size over the 1990-2008 period. *Id.* at 5. Meanwhile, individuals identifying no religious affiliation grew from eight percent to fifteen percent of the population over the same period. *Id.* at 3. Nearly a quarter of Americans now reject the idea of a personal God. *Id.* at 8.

Age compositions of various religious groups indicate that the trend toward a less dominantly Christian population is likely to continue. American adherents of Islam and Eastern religions are likely to be young. More than forty percent of Muslims are between the ages of 18 and 29, and thirty-seven percent of adherents of Eastern religions fall in that age range. *Id.* at 12. Only one percent of Muslims

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[7] *Available at* http://commons.trincoll.edu/aris/files/2011/08/ARIS_Report_2008.pdf.

and three percent of Eastern religion adherents are older than 70. *Ibid.*

Christians, meanwhile, tend to be significantly older. Only about twenty-five percent of Christians are between the ages of 18 and 29. *Ibid.* Between nine and fourteen percent of the faithful in most Christian denominations are older than 70. *Ibid.* Baptists are the most likely to be seniors; more than one fifth of Baptists are over 70 years of age. *Ibid.*

These demographic data indicate that Americans are becoming less Christian over time, and less religious overall. All Americans, including the current religious majority, are thus best protected by a rule recognizing that sectarian prayer at government meetings is not constitutionally permissible simply because it reflects the religious affiliation of the majority at any point in time.

2. Moreover, a rule prohibiting sectarian prayer at local-government meetings protects the nationwide religious majority because that group is not the religious majority in every community.

For instance, Muslims now constitute nearly half the population of Hamtramck, Michigan. Nargis Rahman, *A Model Muslim City (Politically): Hamtramick* [sic], *Michigan*, The Muslim Observer (Mar. 23, 2011).[8] Muslims also account for about forty

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[8] http://tmofoundation.weebly.com/2/post/2011/03/first-post.html.

percent of the population in nearby Dearborn, Michigan. Dan Bryan, *American Islam in Dearborn: A Portrait*, Religion in American History (Apr. 24, 2012).[9] And "Ultra-Orthodox Satmar Hasidic Jews predominate in" the village of Kiryas Joel, New York. Sam Roberts, *A Village With the Numbers, Not the Image, of the Poorest Place*, N.Y. Times, Apr. 21, 2011, at A1.[10]

Like the Board in the Town of Greece, the local religious majorities have sometimes expressed their faiths in public forums. The Hamtramck city council has permitted Hamtramck mosques to broadcast the Muslim call to prayer at appropriate times of the day. John Leland, *Tension in a Michigan City Over Muslims' Call to Prayer*, N.Y. Times (May 5, 2004).[11]

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[9] http://usreligion.blogspot.com/2012/04/american-islam-in-dearborn-portrait.html.

[10] Particular groups that are minority sects within Christianity nationally also have much greater influence in particular regions or localities. For instance, members of the Church of Jesus Christ of Latter Day Saints constitute only 1.4% of the total U.S. population. Kosmin & Keysar, *supra*, at 5. But Mormons also make up more than 60% of Utah's population. Matt Canham, *Census: Share of Utah's Mormon Residents Holds Steady*, Salt Lake Tribune (Apr. 17, 2012), http://www.sltrib.com/sltrib/home3/53909710-200/population-lds-county-utah.html.csp. And Catholics now account for about a third of the population of California and Texas. Kosmin & Keysar, *supra*, at 17.

[11] http://www.nytimes.com/2004/05/05/us/tension-in-a-michigan-city-over-muslims-call-to-prayer.html.

One Christian resident objecting to that practice explained, "My main objection is simple[.] I don't want to be told that Allah is the true and only God five times a day, 365 days a year. It's against my constitutional rights to have to listen to another religion evangelize in my ear." *Ibid.* (internal quotation marks omitted).

But if sectarian legislative prayer is permitted, it cannot be for Christian prayer only. A rule that permits only non-sectarian prayers at local-government meetings thus serves to protect the national religious majority in the growing number of places where the national majority actually is a local minority.

3. Indeed, these demographic changes indicate that even historically grounded justifications for legislative prayer are becoming an ill fit. To the extent this Nation's history of legislative prayer could have been deemed acceptable because it reflected the historical Christian or Judeo-Christian beliefs of its populace, that history has less purchase in modern times. It simply is no longer the case that invocations like the ones at issue here are "conduct whose effect harmonized with the tenets of some or all religions." *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (internal quotation marks and alterations omitted). A growing diversity of faiths casts doubt on the fit between historical practice and modern reality.

Moreover, certain amici supporting petitioner emphasize the importance of *Christian* prayer in particular.[12] But a majority-rules approach undermines, rather than serves, an interest in promoting Christian devotion in the growing number of communities that are not majority Christian. Indeed, if prayer "in the name of Jesus Christ" is uniquely in accord with this Nation's "Godly foundation," as one amicus claims (Br. of Foundation for Moral Law at 1, 9), then sectarian prayer of other faiths might well undermine that history. Non-sectarian prayer, by contrast, would preserve it in a manner inclusive to adherents of all faiths.

II. RESPONDENTS HAVE ARTICLE III STANDING TO CHALLENGE THE PRAYERS BEFORE THE TOWN BOARD MEETINGS

Although petitioner does not contest respondents' standing to challenge the prayers at the Town Board meetings, petitioner's amicus American Center for Law and Justice ("ACLJ") does so. ACLJ Br. 8-16. Contrary to ACLJ's arguments, respondents have

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[12] For example, amicus Nathan Lewin emphasizes that "Jewish law and tradition encourages meaningful Christian prayer." Br. of Nathan Lewin as Amicus Curiae in Support of Pet'r at 6. The Foundation for Moral Law observes that those who pray in the name of Jesus Christ "do so out of obedience to God and His commands as they understand them." Br. of Foundation for Moral Law as Amicus Curiae in Support of Pet'r at 9. The Foundation more generally advocates education about "the Godly foundation of this country's laws and justice system." *Id.* at 1.

more than sufficient injury to establish Article III standing.

ACLJ's arguments are based on the wrong legal standard. Standing does not turn on whether the challengers are "offended observer[s]." *Id.* at 11. Rather, the question is whether respondents "are *directly* affected by the laws and practices against which their complaints are directed." *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n.9 (1963) (emphasis added). Standing requires simply that the plaintiff "*personally* has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (emphasis added).

There is no question that respondents here directly have suffered, and will continue to suffer, injury because of the Greece Town Board's practices. Respondents regularly have attended Town Board meetings at which overtly Christian prayers were given at the invitation of the Board. Respondents also plan to continue attending Board meetings. But they cannot do so without being "subjected to unwelcome religious exercises or * * * forced to assume special burdens to avoid them." *Id.* at 486 n.22.

For example, prayer givers at the Board meetings regularly request that all present join in the prayer, stand, and/or bow their heads. Resp'ts' Br. 11. Board members make similar requests. *Ibid.*

Respondents are then forced personally to decide whether to participate in the exercise of another faith, stand in silence, or remain seated and thereby single themselves out for further ostracism beyond what they already have had to endure, *see supra* pp. 7-11. Each of these is an injury. *See, e.g.*, *Lee*, 505 U.S. at 593 ("the act of standing or remaining silent" during public prayer, "for many, if not most" is "an expression of participation").

Sectarian prayers at local-government meetings thus injure the conscience of adherents to minority faiths. Members of minority faiths who must attend local-government meetings where overtly Christian prayers are offered suffer more than mere "offense." They must choose between their religious conscience and their right to participate in government proceedings. Having to forgo either is an injury in fact.

Unlike the plaintiffs in *Valley Forge*, respondents here have "a personal stake" in this controversy. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (citation omitted); *contra* ACLJ Br. 11. The plaintiffs in *Valley Forge* lacked standing because they learned about the challenged practices secondhand and were never directly affected. The plaintiffs were residents of Maryland and Virginia who complained about a transfer of property from the federal government to a religious institution in Chester County, Pennsylvania, after learning about the transfer from a news release. *Valley Forge*, 454 U.S. at 486-487. There was no allegation or evidence that the plaintiffs had ever seen the transferred property,

had any desire to visit it, or suffered any "personal injury" from the transfer apart from "the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485 (emphasis added).

Respondents here, by contrast, are not mere bystanders disapproving of remote government conduct for purely ideological reasons. They did not "roam the country in search of governmental wrongdoing," nor did they learn of the challenged prayers by reading the news. *Id.* at 487. They have attended Town Board meetings and have been personally affected by the sectarian prayers. Respondents' injury thus is more akin to that of the plaintiff in *Lee*. There, this Court held there was a "live and justiciable controversy" where "it appear[ed] likely, if not certain" that the plaintiff would endure "an invocation and benediction * * * at her high school graduation." *Lee*, 505 U.S. at 584.

Finally, ACLJ is wrong to suggest that recognizing respondents' standing in this case "would render irrelevant the entire body of taxpayer standing precedents." ACLJ Br. 11. This case does not involve a government expenditure, and so taxpayer standing simply is not at play here. Moreover, respondents have a personal stake in the outcome of this controversy; they need not rely on their status as taxpayers. The taxpayer-standing doctrine thus will continue to have robust application in cases where plaintiffs are not personally affected by the allegedly unconstitutional government expenditure apart from their

status as taxpayers. *See, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 618-620 (1988).

CONCLUSION

For the reasons set forth above and in respondents' brief, the judgment should be affirmed.

Respectfully submitted,

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SEPTEMBER 23, 2013

AMICUS CURIAE BRIEF

No. 12-696

In The Supreme Court of the United States

AUG 2 - 2013

TOWN OF GREECE, NEW YORK,

Petitioner,

v.

SUSAN GALLOWAY, *ET AL.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF VIRGINIA CHRISTIAN ALLIANCE, CONCERNED WOMEN FOR AMERICA, CONGRESSIONAL PRAYER CAUCUS FOUNDATION, FREDERICK DOUGLASS FOUNDATION OF VIRGINIA, THE VALLEY FAMILY FORUM, FREDERICKSBURG RAPPAHANNOCK EVANGELICAL ALLIANCE, THE BLACK ROBE REGIMENT OF VIRGINIA and MEMBERS of the VIRGINIA SENATE and VIRGINIA HOUSE OF DELEGATES

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

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INTEREST OF *AMICI*[1]

Amici are a collection of organizations and Members of the Virginia Senate and House of Delegates (individually named in an Appendix to this brief) who share a profound respect for America's rich religious heritage and oppose efforts to unmoor modern public affairs from that history.

Regrettably, the application of the Endorsement Test and the Effects prong of the *Lemon* Test in modern Establishment Clause cases has hastened a pronounced marginalization of our nation's heritage and a departure from cherished traditions—changes which have never been sanctioned by the people through constitutional revision or legislation. The Court's modern-day Establishment Clause framework effectively provides the secularist with a perpetual heckler's veto that undermines the broader values underlying the First Amendment as a whole. *Amici* request that the Court fundamentally reevaluate and reshape this framework.

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[1] Rita M. Dunaway authored this brief for *amici curiae*. No counsel for any party authored this brief in whole or part, and no one apart from *amici*, members of *amici* organizations, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties to this action have filed blanket consents to the filing of *amici curiae* briefs.

SUMMARY OF THE ARGUMENT

Amici urge the Court to abandon the Endorsement Test and the Effects prong of the *Lemon* Test, which result in the invalidation of non-coercive government recognitions of religion.[2] Religion in the public square is a defining characteristic of our nation's heritage.

The Second Circuit's decision below—invalidating a non-discriminatory policy of allowing private citizens to pray at town meetings—represents a fall down the slippery slope that has resulted from determining constitutional cases upon the subjective "feelings" of bystanders. *Amici* insist that the proper function of the Bill of Rights—and the courts charged with interpreting it—is not to protect *feelings* but to protect *liberty*. Simply put, the emotional, subjective feeling of "fitting in" is not a liberty interest that is recognized in the Bill of Rights, and it therefore should not be the basis for civil rights litigation.

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[2] The Endorsement Test, which was crafted by Justice O'Connor and applied in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), forbids government actions that have the purpose or effect of "endorsing" religion. The *Lemon* Test forbids government acts that have no secular purpose, have the primary effect of advancing or inhibiting religion, or involve an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Amici* will discuss these two analyses together because the Court has described *Lemon*'s second prong as prohibiting government endorsements of religion. *See Allegheny*, 492 U.S. at 592.

The propriety of incorporating the Establishment Clause as a component of the "liberty" protected by the Fourteenth Amendment hinges on the interpretation of the Clause to protect real, substantive liberty interests. When the Establishment Clause is divorced from its historical purpose (as evidenced by the ratification debates) and interpreted as a general mandate for government to be religiously sterile, it cannot be properly categorized as the same type of liberty interest as the others enumerated in the First Amendment and incorporated into the Fourteenth. But a return to the historical interpretation of the Establishment Clause as a protection against government acts that coerce some tangible support for or adherence to religion would supply the logic for incorporation.

Perhaps more importantly, interpretation of the Establishment Clause as the protection of a true liberty interest (freedom from coerced support for religion) rather than the prohibition of non-coercive government endorsements of religion would bring to this Court's Establishment Clause jurisprudence the coherence that, at present, is sorely lacking. This interpretive refinement would allow the Court to maintain logical integrity in upholding venerable national traditions such as the Pledge of Allegiance, public prayers, the recognition of religious holidays, and countless other practices that are integral components of our national identity, while striking

down government policies that feature coercive elements.

The abandonment of Establishment Clause analyses that allow litigants to successfully sue government officials and agencies based upon no more concrete injury than the litigants' hurt feelings would offer the important advantage of reducing the number of expensive, highly unpredictable federal lawsuits.

Finally, only by reworking its Establishment Clause analysis can the Court provide the proper breathing room for religious expression by citizens—whether a private citizen speaking at government meetings or an individual public official. Each enjoys the rights of free speech and religious freedom under the First Amendment, the exercise of which do not pose any of the true dangers addressed by the Establishment Clause. The liberty interests of free speech and free exercise—explicitly guaranteed by the First Amendment—are simply incompatible with a judicial analysis that is solicitous of bystander feelings, which find no source of constitutional protection. The Court cannot serve both masters. *Amici* submit that it is the duty of the Court to serve the master of liberty, as prescribed in our Constitution, by rejecting a jurisprudence of feelings.

ARGUMENT

I. The Endorsement Test and its application as part of the Effects Prong of the *Lemon* Test reflect an interpretation of the Establishment Clause that undermines the rationale for its incorporation into the Fourteenth Amendment.

Prior to 1947, the Establishment Clause[3] was interpreted, in keeping with its text, as a restriction on the federal government's ability to "establish" a national religion or to interfere with state "establishments" of religion. According to James Madison's explanation of the Clause to the First Congress, compulsion was the essence of establishment. *See* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. AND MARY L. REV. 933, 937 (1986) (*citing* 1 ANNALS OF CONG. 730 (J. Gales ed. 1834) (Aug. 15, 1789)).

In *Everson v. Board of Education*, 330 U.S. 1 (1947), the Court declared that the entirety of the First Amendment would thenceforth be applied to the states via the "liberty" guarantee of the Fourteenth Amendment.[4] The incorporation of the

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[3] "Congress shall make no law respecting an establishment of religion..." U.S. CONST. Amend. I.

[4] "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV, §1.

Establishment Clause in particular, however, has been criticized. One scholar, for instance, has remarked that, "Everson's incorporation of the [Establishment] Clause against the states required a 'constructional wrench' in order 'to squeeze a structural clause into a "liberty mold."...'" James J. Knicely, *"First Principles" and the Misplacement of the "Wall of Separation": Too Late in the Day for a Cure?* 52 DRAKE L. REV. 171, 175 (Winter, 2004) (*quoting* Arthur E. Sutherland, Jr., *Establishment According to Engel*, 76 HARV. L. REV. 25, 41 (1962); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 104 (1998).

It is undeniably awkward to turn a Clause that was designed, in part, to protect state religious establishments from federal interference into a prohibition of state government actions that manifest the slightest favor for religion. But if Madison's explanation of the Establishment Clause's purpose (the prohibition of government-compelled support for religion) is accepted, its application to the states flows naturally from the Fourteenth Amendment's liberty guarantee.

A citizen's freedom from being coerced to tangibly support religion or conform to its doctrines is unquestionably a constitutionally cognizable individual "liberty." It is only under contemporary interpretations of the Establishment Clause not as a protection from government coercion, but rather as a

blanket mandate of complete government separation from religion, that the Clause's incorporation into the Fourteenth Amendment loses its rational footing.

Verbal or symbolic "endorsements" of religion in public affairs surely cannot be said to impact individual liberty in a constitutional sense; they do no more than potentially impact *feelings*, or *thoughts*, which are no proper subject of constitutions nor the courts charged with interpreting and applying them. Those who settled this country and gave birth to the First Amendment did not flee their former homes to seek solace from hurt feelings, but from true religious bondage in the form of legal compulsion to support government-favored churches.

The Court should accordingly retreat from modern interpretations which reflect significant, unauthorized and counter-historical revisions to the Establishment Clause. The liberty interest protected by the Establishment Clause is nothing more nor less than freedom from tangible legal coercions with regard to religion.

II. The Endorsement Test and its application as part of the Effects Prong of the *Lemon* Test must be abandoned in order to bring coherence, logical integrity, and predictability to Establishment Clause jurisprudence.

A. The prevailing Establishment Clause frameworks have produced confusion.

The disheveled, inconsistent state of modern Establishment Clause analysis is all but universally acknowledged, having been described as a "hopeless disarray," producing "silly" and "embarrassing" results, and comprising "a multi-test, patchwork approach." James A. Campbell, Newdow *Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard provides the Necessary Renovation*, 39 AKRON L. REV. 541, 542 (2006) (*quoting Rosenberger v. Univ. of Virginia*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring); *Edwards v. Aguillard*, 482 U.S. 578, 639-40 (1987) (Scalia, J., dissenting)). Fundamental reevaluation and substantive revision are clearly in order.

Under the Endorsement Test expounded by Justice O'Connor and applied by the Court in *Allegheny v. American Civil Liberties Union*, government practices are unconstitutional if they have the purpose or effect of "endorsing" religion. 492 U.S. 573, 592 (1989). This approach seeks to preclude the government from "mak[ing] a person's religious beliefs relevant to his or her standing in the political community by conveying a message that

religion or a particular religious belief is favored or preferred." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 33 (2004) (O'Connor, J., concurring). Under this formula, the "evil" the Endorsement Test seeks to eliminate may be characterized as a certain type of message, perception, or emotion.

The Endorsement inquiry is echoed in various iterations of the second prong of the Court's *Lemon* Test, which requires a government practice to have a secular purpose, a primary effect that neither advances nor inhibits religion, and to avoid excessive entanglement of government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

But a truly consistent application of either the Endorsement Test or *Lemon* Test would invalidate countless historical practices and traditions that were perfectly acceptable to those who drafted and adopted the First Amendment. Campbell, *supra*, at 546-47, notes 40-42. For instance, on the very day after the adoption of the First Amendment by Congress, the House and Senate passed a resolution requesting that the President "recommend to the people of the United States a day of public fasting and prayer, to be observed, by acknowledging with grateful hearts, the many signal favors of the Almighty God."[5] It cannot seriously be maintained that such an act is not an endorsement of religion that may have caused sensitive non-religious Americans to "feel like outsiders," a factor that is of great constitutional moment under the Endorsement

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[5] *See* Daniel P. Whitehead, *Agostini v. Felton: Rectifying the Chaos of Establishment Clause Jurisprudence*, 27 CAP. U. L. REV. 639, 654 (1999).

Test. *See Newdow*, *supra*, 542 U.S. at 33 (O'Connor, J., concurring).

Chief Justice Burger recognized in *Lynch v. Donnelly* that, "Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." 465 U.S. 668, 675 (1984). But as Justice Kennedy has observed, "Few of our traditional practices recognizing the part religion plays in our society can withstand scrutiny under a faithful application of [the Endorsement Test] formula." *Allegheny*, 492 U.S. at 670 (Kennedy, J., dissenting).[6]

The Court can safely assume that the Founding Fathers understood the meaning of the Establishment Clause and complied with it. The fact, then, that countless of their actions would be invalid under the Court's Endorsement Test or the Effects prong of the *Lemon* Test leaves only one logical conclusion: these tests do not properly gauge whether an action violates the Establishment Clause.

As it stands, when venerated historical practices (such as legislative prayers) are challenged under the Establishment Clause, this Court is left with three unsavory alternatives: to strike down the practice as unconstitutional (thus implying that those who drafted and adopted the First Amendment

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[6] *See also Lee v. Weisman*, 505 U.S. 577, 631-32 (1992) (Scalia, J., dissenting) (arguing that the psychological coercion test would invalidate the national tradition of including prayers in public ceremonies).

were lacking either in understanding or integrity); to uphold the practice by declining to apply the tests it has created; or to seize upon the pronounced subjectivity of these tests and lend constitutional significance to trivial details of the case at hand. Selection of the third option makes it increasingly difficult for lower courts and citizens to distill any helpful guiding principles from the Court's voluminous, splintered opinions.

For instance, under *Allegheny* and *Lynch*, the constitutionality of religious symbols in town holiday displays appears to turn on such factors as the desirability of the religious symbol's precise location and the extent to which the religious message is diluted by the presence of silly, secular objects such as wishing wells and candy-striped poles. *Allegheny*, 492 U.S. 573 (crèche standing alone on Grand Staircase unconstitutional); *Lynch*, 465 U.S. 668 (crèche displayed in park amidst Santa Claus, teddy bears and reindeer constitutional).

Justice Kennedy has remarked that the Court has embraced a "jurisprudence of minutiae" and noted that current modes of analysis "must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past." *Allegheny*, 492 U.S. at 674 (Kennedy, J., dissenting). *See also* Stephen L. Carter, *The Culture of Disbelief – How American Law and Politics Trivialize Religious Devotion*, p. 113 (Anchor Books 1993) ("[S]quaring *Lemon*'s rules with the

accepted usages of the society's civil religion often requires some fancy footwork.").

Lower courts, however, lack the authority to either ignore this Court's tests or perform the sort of twisting and stretching Justice Kennedy describes. These courts—as well as the government officials and agencies charged with understanding and abiding by the Establishment Clause—require a legible, coherent roadmap in order to navigate with confidence a national terrain that includes both a rich religious heritage and deeply religious citizens, but also a scrupulous commitment to freedom of conscience. Until this Court provides such guidance, this area of constitutional law will be characterized by confusion.[7]

B. The Court's current frameworks are incapable of properly addressing legislative prayer.

The law on legislative prayer presents an excellent case study on the incompatibility of the Court's current Establishment Clause tests with the history of federal, state and local government practices.

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[7] *See The Supreme Court, 1988 Term: Leading Case: I. Constitutional Law*, 103 HARV. L. REV. 137, 234 (1989) (arguing that the Endorsement Test suffers from at least three flaws: uncertainty, malleability, and inability to account for past judicial decisions).

In *Marsh v. Chambers*, 463 U.S. 783 (1983), this Court upheld the Nebraska legislature's practice of opening its sessions with prayers delivered by a state-employed clergyman. Under a faithful application of the *Lemon* Test, the legislative prayers certainly would have been struck down. Even assuming that the Court could have articulated some "secular purpose" for the practice (the possibility of which poses serious questions about the usefulness of the Purpose prong of the test), to expend state resources for a clergy-led prayer at legislative sessions certainly evinces a type of collective respect (and financial support) for religion that would be said to "advance" religion.

Presumably *because* the cherished tradition of legislative prayer could not have survived under the three-part *Lemon* Test, which had been the standard analysis for Establishment Clause cases since 1971, the Court simply ignored the test and relied on the longstanding history of the practice to uphold it. The Court sensibly reasoned that if the First Congress did not consider legislative prayer to constitute an "establishment," then neither should the Supreme Court. *Marsh*, 463 U.S. at 788. The Court thus approved the legislative prayers as "simply a tolerable acknowledgement of beliefs widely held among the people of this country." *Id.*, at 792.

It is virtually certain that the legislative prayers upheld in *Marsh* would have been doomed under an

application of the now-prevalent Endorsement Test. According to the Court's articulation of this test, it is almost impossible to believe that opening government sessions with prayer does not send a message that the government "endorses" religion.

From a historical perspective, the reasoning of *Marsh* is surely correct. If anyone understood what the Establishment Clause meant, it was surely those who crafted, debated and adopted it. The inability of the Court's prevailing analyses to arrive at the correct conclusion of *Marsh* thus signals their fundamental deficiencies.

While history provides confidence that *Marsh* was correctly decided, the fact that the decision was reached only by jettisoning the Court's prevailing Establishment Clause analyses obliterates our collective confidence that said analyses will produce sound results in future cases. The Court has, in effect, embraced a jurisprudence of "grandfathering" for certain, select practices, while subjecting newer or more unique acknowledgements of religion to subjective, malleable analyses that have been proven incompatible with the original purpose of the Establishment Clause.

In interpreting *Marsh* and applying its principles to other cases, some lower federal courts have emphasized the fact that the prayers offered by the Nebraska legislative chaplains were "non-sectarian," as if this fact might be the slender reed upon which

generic legislative prayers—as well as the multitude of traditional religious practices, symbols and acknowledgements that punctuate our government—might be upheld under the Court's contemporary Establishment Clause doctrine. *See, e.g., Joyner v. Forsyth County*, 653 F.3d 341, 348-49 (4th Cir. 2011).

But this factor can provide no logical bridge between analytical tests that forbid government to "advance" or "endorse" religion and the Court's acceptance of official government prayers. The Supreme Court has specifically stated that, "[t]he suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted." *Lee v. Weisman*, 505 U.S. 577, 590 (1992). Indeed, this would be the type of "endorsement" (one appealing to the largest majority) that would presumably be most likely to produce in atheists, agnostics, or adherents of minority religions the feeling of being "an outsider" which the Court has purposed to eliminate from our culture.

So the non-sectarian or generic nature of historically ubiquitous prayers and religious acknowledgements cannot render them constitutionally acceptable under the Court's existing Establishment Clause frameworks. The frameworks, in other words, are hopelessly irreconcilable with history.

As Justice Kennedy has acknowledged, "A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause." *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring). While the historical pedigree of a practice should signal that it is consistent with the original purpose and understanding of the Establishment Clause, time-honored traditions cannot simply be "grandfathered" into constitutionality but must instead inform the Court's prospective interpretation of the Clause.

C. American government has historically been replete with openly religious expressions, displays, and acknowledgements.

It would be convenient to categorize legislative prayer as a unique appearance of religion in public life that warrants its own specialized legal analysis, but a day's tour of our nation's Capitol or a review of early government documents quickly disabuses one of such a notion. An intellectually honest application of either the *Lemon* Test (with the Court's "endorsement" gloss) or the Endorsement Test would render unconstitutional countless time-honored national traditions and treasures, including the Pledge of Allegiance, various National Monument inscriptions, Presidential Thanksgiving Proclamations, Supreme Court opening traditions, the décor of the Capitol and the presence of a

religiously themed "prayer room" therein, the United States Code's setting aside of a National Day of Prayer, the national motto, "In God We Trust," and its inscription on various government buildings and currency. *See Allegheny*, 492 U.S. at 670-74 (Kennedy, J., concurring).

Indeed, the text of the preamble to the Declaration of Independence itself is constitutionally offensive under the Endorsement Test and Effects prong, for it not only presumes the existence of a "Creator," but that the very purpose of all government institutions is to secure rights that He has bestowed upon mankind.

Our government has never been religiously "neutral," in the sense of being indifferent toward religion or sterile of religious reference, and absent proper constitutional revision, the Court lacks authority to make it so under the guise of a clause that was clearly not adopted for such purpose. As Justice Joseph Story has explained, "[T]he general if not the universal sentiment in America was that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: VOLUME 2 § 1874 (Melville M. Bigelow ed., 5th ed. 1891).

D. Establishment Clause litigation is rampant and unpredictable.

Since the Court made the Establishment Clause applicable to the states in 1947, challenges to government policies and practices under the Clause have mushroomed.[8] Due to the Court's adoption of imprecise, highly subjective analyses that ignore original legislative intent in favor of a focus on presumptions about legislative motives, "primary" effects, and the feelings of bystanders, the outcomes of Establishment Clause challenges are highly unpredictable. *See Van Orden v. Perry*, 125 S. Ct. 2854, 2867 (2005) (Thomas, J., concurring) ("[T]he very 'flexibility' of this Court's Establishment Clause precedent leaves it incapable of consistent application.")

The current framework functions as a virtual "hunting license" for persons or organizations who wish to eliminate religion from public life. For when they challenge a government policy or practice in zealous pursuit of this agenda, the lack of predictability in this area of constitutional law often influences government attorneys to advise their publicly accountable clients to simply accede to the demands for secularism.

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[8]*See, e.g.*, Knicely, *supra*, at 173 (contrasting number of Establishment Clause cases pre-*Everson* (2) and post-*Everson* (over 50 as of 2004)).

The case before the Court illustrates this point perfectly. Even when a local government body has ensured that its invocation practice is neutral toward religion and features private speakers, the locality risks a costly lawsuit in defending the practice. Few localities, if any, will be possessed of the sort of conviction required to take such a chance when the outcome of the litigation may turn on factors entirely beyond the body's control, such as the number of adherents to minority religions who show up and choose to pray. Those government officers who do assume such risks are likely to lose their public offices in the bargain.

The only way to stem the tide of litigation and bring coherence, logical integrity and predictability to the current disarray of Establishment Clause jurisprudence is to abandon the Endorsement Test and current interpretation of the Effects prong of the *Lemon* Test and replace them with a framework that can bear the weight of both our rich, religious history and our commitment to liberty from real religious oppression.

III. The Court should adopt an Establishment Clause framework that focuses on the element of coercion.

Governments surely do not exist to protect "feelings," but to protect *liberty*. *Amici* therefore echo the views of Justices Scalia and Thomas by urging the Court to adopt an "actual legal coercion"

test for Establishment Clause cases. *See Lee,* 505 U.S. at 631-46 (Scalia, J., dissenting) (discussing concept of coercion as it relates to meaning of Establishment Clause); *Newdow*, 542 U.S. at 52 (Thomas, J., concurring) (arguing for actual legal coercion test).[9] Adoption of such a straightforward, objective analysis would bring much-needed clarity, coherence, and predictability to Establishment Clause jurisprudence.[10]

In embracing judicial analyses that turn upon the emotional reaction of bystanders to words or symbols that reflect our nation's religious heritage or the role of religion in contemporary American life, the Court has enabled a collaboration of soft-skinned, feelings-focused litigants to obscure the legacy of the Founding Fathers and dramatically alter our public life. This has actually cheapened the concept of religious liberty.

Our forefathers did not craft the religion clauses of the First Amendment to ensure that no one would

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[9] *See also* McConnell, *supra* (arguing that coercion should be the primary consideration in Establishment Clause cases); Campbell, *supra*, at pp. 580-592 (arguing that Court should adopt Justice Thomas' actual legal coercion test).

[10] *See* Campbell, *supra*, at 580 ("The adoption of Justice Thomas's actual legal coercion test will 'provide Establishment Clause jurisprudence with clarity and predictability.'") (*quoting* Ralph W. Johnson III, *Lee v. Weisman: Easy Cases Can Make Bad Law Too—The "Direct Coercion Test is the Appropriate Establishment Clause Standard*, 2 GEO MASON IND. L. REV. 123, 178 (1993)).

"feel" like an "outsider;" they designed them to ensure that no one would be subjected to religious persecution, coerced to tangibly support government churches, or prohibited from exercising his religion.[11] Thus, under a historically correct interpretation of the First Amendment, "indirect" or "psychological coercion" are not relevant. The analysis must, instead, focus on whether the challenged government action compels an individual to embrace or support religion by word or act.[12]

A return to this original understanding of the Establishment Clause would offer considerable benefits to society. Among these are the provision of a logical basis for the incorporation of the Clause (now properly interpreted as a liberty interest) to the Fourteenth Amendment and the harmonizing of the Clause's modern interpretation with our national traditions. These issues have already been discussed, *supra*.

But adoption of a truly coercion-focused Establishment Clause analysis would also eliminate the unseemly tension between that Clause, as currently interpreted, and the Free Speech and Free Exercise Clauses, thus enhancing the broader values

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[11] *See Campbell*, *supra*, at 545-46 (recounting the real religious tyranny that led to America's founding and the Revolutionary War).

[12] *See Id.*, at 556; Gidon Sapir, *Religion and State—A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 591 (1999) (discussing various views of "coercion").

of the First Amendment as a whole. And finally, adoption of a coercion-focused analysis would demonstrate proper judicial restraint and due deference for the role of the political process with regard to citizen grievances that are essentially social and psychological in nature rather than legal.

A. An analysis focused on the prohibition of religious coercion would harmonize the Establishment Clause with the Free Speech and Free Exercise Clauses and eliminate censorship.

The case at bar is a perfect example of how the Court's current modes of Establishment Clause analysis result in censorship of religious expression. The example in this case is particularly compelling, because those being precluded from offering invocations are private individuals who were merely given the opportunity to pray in a public setting according to their own particular belief systems.

Justice O'Connor has posited that the Endorsement Test is particularly suited to cases involving challenges to government-sponsored speech or displays. *Newdow*, 542 U.S. at 33 (O'Connor, J., concurring). But under this framework, even the most fleeting benevolent reference to religion must be banned from the lips of

anyone who can be characterized as a "government speaker."[13]

Even when the words challenged as a religious endorsement are the expression of a government official, a nation committed to free expression should be loath to censor his or her speech, because it is just that: speech. Speech is personal, transient, and sometimes unplanned. It is, and is commonly understood to be, the conveyance of the unique formulation of thoughts, feelings, attitudes and beliefs of the speaker. It is thus inherently distinct from law or policy in regards that are constitutionally significant when the Establishment Clause is properly interpreted as a liberty guarantee.

As Justice Scalia has emphasized, speech is inherently non-coercive; "the listener may do as he likes." *Lee*, 505 U.S. at 642 (*quoting American Jewish Congress v. Chicago*, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting)). First Amendment scholar Stephen L. Carter has likewise recognized that religious verbiage "demand[s] nothing of us. Not only are [religious platitudes] easily ignored by those who happen to have no religious beliefs, but they make virtually no demands on the consciences of those who do." Carter, *supra*, at 52.

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[13] *See* Campbell, *supra*, at 559, "Current Establishment Clause analysis generally requires government silence regarding religious matters."

As a legal matter, there is simply no conflict between one person's free speech and another person's religious freedom. The bystander's impregnable shield against religious oppression is enshrined in the First Amendment's complementary guarantees that he may practice his own religion freely and may not be compelled to support any other. This shield is not permeated by the spoken words of others. On the other hand, interpreting the Establishment Clause to preclude religious speech or references from the halls of government interferes with individual liberty in a way that defies both the letter and the spirit of the First Amendment as a whole.

B. An analysis focused on the prohibition of religious coercion would stem the tide of unhelpful Establishment Clause litigation and restore the role of the political process in resolving grievances that do not infringe upon individual liberty.

Justice Scalia has aptly noted that courts are well-equipped to take cognizance of coercion when it is backed by legal force or threat of penalty, but ill-equipped to adjudicate feelings, for judges have "made a career of reading the disciples of Blackstone rather than of Freud." *Lee*, 505 U.S. at 632 (Scalia, J., dissenting). Yet the feelings of bystanders are a central component of the Endorsement Test which

has, in turn, been largely absorbed into the Effects prong of the *Lemon* Test.[14]

The judiciary's imbuing subjective, transient individual feelings with constitutional significance not only aggrandizes the judiciary's role in resolving the people's grievances against public officials; it proportionally diminishes the role of the political process. The actual legal coercion test does not leave without remedy the city resident who feels offended by a religious tone set at city meetings; it only requires that her concern be shared by sufficient numbers of others and expressed at election time. *See Campbell*, *supra*, at 586 (arguing political process is proper remedy for citizens displeased with government's religious speech). In this way, citizens' various feelings and persuasions can be given full vent at the ballot box and the judiciary can properly limit its role to protecting substantive rights.

CONCLUSION

Distasteful or unpleasant as it may be to some, the inescapable fact is that religion has always played a significant role in American government. Litigants who seek to eliminate public prayer and relegate religious references to the private recesses of society can only do so by liquidating the

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[14] *See Newdow*, 542 U.S. at 33 (O'Connor, J., concurring) (Endorsement is improper because it "sends a message to nonadherents that they are outsiders..."); *Allegheny*, 492 U.S. at 592.

Establishment Clause from its historical, liberty-based form and recasting it as a general mandate for an entirely secular public square, utterly sterile of religious tradition or acknowledgement. But they cannot succeed in doing this without the complicity of judicial analyses that exalt cultural trends over historical grounding, decisional expediency over logical integrity, and personal feelings over civil liberty.

Amici respectfully request that the Court reverse the Second Circuit's decision below and embrace a coercion-focused Establishment Clause analysis in place of the prevailing, dysfunctional Endorsement Test and Effects prong.

Respectfully submitted,

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APPENDIX A

The Members of the Virginia Senate and the Virginia House of Delegates who have joined this brief as *amici curiae* are the Honorable:

Delegate Richard P. Bell
Senator Richard H. Black
Delegate Todd Gilbert
Senator Emmett Hanger
Delegate Ben L. Cline
Delegate R. Steven Landes
Delegate Robert G. Marshall
Senator Steve Martin

AMICUS CURIAE BRIEF

No. 12-696

In the Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF *AMICUS CURIAE* OF WALLBUILDERS, INC.
in support of the Petitioner
and supporting reversal

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INTEREST OF *AMICUS CURIAE*[1]

WallBuilders, Inc., is a non-profit organization that is dedicated to the restoration of the moral and religious foundation on which America was built. WallBuilders' President, David Barton, is a recognized authority on American history and on the role of religion in public life. As a result of his expertise in these areas, he works as a consultant to national history textbook publishers. He has been appointed by the State Boards of Education in states such as California and Texas to help write the American history and government standards for students in those states. Mr. Barton also consults with Governors and State Boards of Education in several states, and he has testified in numerous state legislatures on American history. Much of his knowledge is gained through WallBuilders' vast collection of rare, primary documents of American history, including more than 70,000 documents predating 1812.

Furthermore, WallBuilders encourages citizens all across America to continue the tradition of bringing religious perspectives to bear in public life. WallBuilders and its constituents desire to see religion treated as the Framers of the First

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[1] All parties have consented to the filing of this Brief through blanket letters of consent lodged with the Court. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amicus Curiae*, and their counsel.

Amendment intended and seek to clarify what the establishment of religion really means.

SUMMARY OF THE ARGUMENT

The parties agree that this case is controlled by the test from *Marsh v. Chambers*, 463 U.S. 783 (1983). However, they disagree over how that test operates. The Town believes that under *Marsh*, prayers of deliberative bodies are presumptively constitutional unless the body has an impermissible motive in selecting prayer-givers or the prayers are used to proselytize for or disparage a particular faith. On the other hand, Ms. Galloway and Ms. Stephens (hereinafter "Galloway"), believe that courts must examine the "totality of the circumstances, taking stock of the prayer-giver selection process, the content of the prayers, and the contextual actions (and inactions) of prayer-givers and town officials." (Br. in Opp. 13.)

The Town's version of the *Marsh* test is the correct one and under that test, its prayers pass constitutional muster.

Galloway's version of the test in incorrect because it does not treat *Marsh* as an exception to the main body of Establishment Clause jurisprudence. By failing to recognize that *Marsh* is an exception, Galloway's version of the test ignores the fact that deliberative body prayers are *supposed* to be thoroughgoingly religious and thus will naturally often reflect the views of the majority religion. This, of course, would be problematic under other lines of Establishment Clause cases. But it is not problematic under the correct version of *Marsh*, since that is the whole point of an exception.

Furthermore, Galloway's version of the test incorporates spurious considerations. Her version "backfills" such concepts as the reasonable observer and the totality of the circumstances from other Establishment Clause contexts. It also introduces red herrings, such as the religious nature of

the public interest law firm representing the Town and the presence of children at the Town's meetings.

On the other hand, the Town's version of the *Marsh* test is the correct one. This is so because it is based upon the Framers' understanding of the establishment of religion. Specifically, the Framers' distinguished four concepts: the acknowledgement of religion, the accommodation of religion, the encouragement of religion, and the establishment of religion. In balancing the rights of the religious majority with the rights of religious minorities, the Framers allowed the acknowledgement of religion, the accommodation of religion, the encouragement of religion. Only the establishment of religion is forbidden. The Town's version of the *Marsh* test draws that line in the right place, and under the Town's test, its prayers do not establish religion.

Furthermore, all of these matters apply to the prayers of local deliberative bodies, as much as to the prayers of national and state deliberative bodies.

ARGUMENT

The parties agree that this case is controlled by the test from *Marsh v. Chambers*, 463 U.S. 783 (1983). However, they disagree vehemently over the content of that test.

One is reminded of the old TV show, *To Tell the Truth*, in which two impostors pretend to be a third person. Here only two *Marsh* tests are competing, but were the classic question—"Will the real *Marsh* test please stand up?"—asked, the Town's version would be revealed as the real test and Galloway's would be revealed as the impostor. This Brief will explain why this is so.

I. THE TESTS STATED: THE REAL *MARSH* TEST VS. THE IMPOSTOR *MARSH* TEST.

The Town asserts that the *Marsh* test presumes that legislative prayer is constitutional, absent one of two infirmities (or both). First, the government cannot act with impermissible motive in selecting prayer-givers. Second, the government cannot exploit the prayer opportunity "'to proselytize or advance any one, or to disparage any other, faith or belief.'" (Petr.'s Br. 12 citations to *Marsh* omitted; some internal quotations omitted).)

On the other hand, Galloway asserts that the *Marsh* test requires courts to weighed the "totality of the circumstances, taking stock of the prayer-giver selection process, the content of the prayers, and the contextual actions (and inactions) of prayer-givers and town officials." (Br. in Opp. 13 (internal quotations omitted.)

II. GALLOWAY'S *MARSH* TEST IS THE IMPOSTOR BECAUSE IT IGNORES THE FACT THAT LEGISLATIVE PRAYERS ARE *SUPPOSED* TO BE THOROUGHGOINGLY RELIGIOUS AND BECAUSE IT IMPORTS SPURIOUS CONSIDERATIONS.

A. Galloway's *Marsh* Test Ignores the Fact that Legislative Prayers are Supposed to be Thoroughgoingly Religious When it Refuses to Treat *Marsh* as an Exception to Other Lines of Establishment Clause Jurisprudence.

Critically important to a proper resolution of this case is a recognition that *Marsh* is an *exception* to other Establishment Clause tests. Indeed, this was the very point of Justice Brennan's dissent in *Marsh*:

> The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal "tests" that have traditionally structured our inquiry under the Establishment Clause. That it fails to do so is, in a sense, a good thing, for it simply confirms that the Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer.

Marsh, 463 U.S. at 796 (Brennan, J., dissenting).

The implication that follows from this exception ought to be obvious, though it has escaped some courts. As Justice (then Judge) Ginsburg has written:

> The common feature [of all legislative prayer], however, as the Court observed, is the invocation of "Divine guidance." Prayer to open each legislative day, the Court stated, was a religious observance acceptable to the drafters of the first amendment, and is today "part of the fabric of our society."

Kurtz v. Baker, 829 F.2d 1133, 1147 (D.C. Cir. 1987) (Ginsburg, J., dissenting) (citations omitted).

Justice Ginsburg went on to put an even finer point on the implications to be drawn from *Marsh*: "The prayer practice that has existed in legislative assemblies in the United States for 'more than 200 years,' I conclude, is not subject to constitutional assault given the High Court's

recent and resounding declaration." *Id.* (citations omitted).

This latter articulation of the constitutionality of legislative prayer is especially instructive in light of the easily documented proliferation of explicitly Christian prayers in the United States House and Senate. For example, forty-nine Members of the House of Representatives, in their *amicus* brief at the cert. petition stage of this case, documented this overwhelmingly Christian nature of the prayers offered in *recent* sessions of Congress. (Br. of Members of Congress as *Amici Curiae* in Support of the Petition for a Writ of Certiorari, throughout.)

This is not to say that legislative prayers will always be explicitly Christian, of course. It is simply to say that in the typical challenge to legislative prayers, the plaintiff objects to the prayers on this ground. *See, Snyder v. Murray City Corp*, 159 F.3d 1227, 1231 (10th Cir. 1998) (*en banc*) ("prayer cases typically arise in a procedural posture that pits an audience member of a particular faith, often a minority religious view, against a government-sanctioned speaker who has recited a prayer, often expressing a majoritarian religious view, during a government-created prayer opportunity.") And it is to say that where the prayers are overwhelmingly Christian, that fact cannot be a ground for holding the prayers violative of the Establishment Clause—not under the real *Marsh* test, that is.

Your *Amicus* will not repeat the statistics supplied by the Representatives' Brief. Rather, your *Amicus* will merely 1) point out that this phenomenon was also true when Justice Ginsburg stated that Congress's chaplain's prayers are unassailable under *Marsh*, and 2) demonstrate this truth in a more visual way. Some older congressional

prayers can be accessed on the Internet in such a way that the researcher can find information more easily than having to locate hard copies of old congressional documents and then reading them cover to cover making tallies of various types of prayers.

Your *Amicus* will suggest just two Internet sources from which one can visually get the sense of how prolific such explicitly Christian prayers have been. First, one can navigate to the following website: http://books.google.com/books?id=z-kTAAAAYAAJ&printsec=frontcover&dq=%22prayers+offered+by+the+chaplain%22&hl=en&sa=X&ei=5FD7UfvYDIPq9ATP5oGQBQ&ved=0CDoQ6AEwAg#v=onepage&q&f=false (last visited Aug. 2, 2013). There one can examine for one's self a digitized copy of the congressionally published book by Edward E. Hale, *Prayers in the Senate: Prayers Offered in the Senate of the United States in the Winter Session of 1904.* One will see that day after day after day after day, for that entire session, *every single* prayer was explicitly Christian.

In Galloway's Question Presented in her Brief in Opposition, she complains that "[m]any of the prayer-givers have elaborated on Christian tenets and celebrated the birth and resurrection of Jesus Christ; one asked attendees to recite the Lord's Prayer in unison." (Br. in Opp. i.) Yet in the pages of *Prayers in the Senate*, one sees that the Chaplain either prayed or led (it is not clear which) the Lord's Prayer virtually every day and (based on the Table of Contents of the book), the Chaplain appeared to have deliberately coordinated his prayers with the Christian calendar, explicitly noting Passion Week and Easter Week.

The second Internet source from which one can visually get the sense of how prolific such explicitly Christian prayers have been—*Prayers Offered by the Chaplain* by Frederick Brown Harris—can be found at the following website: http://archive.org/stream/prayersofferedby00unit#page/n0/mode/2up. Here again,

virtually every prayer offered during the 87th and 88th Senates (1961-1964) was explicitly Christian—perhaps a few could be considered generic Judeo-Christian prayers.

These two sources, with their readily accessible visual images, help one understand just how off-base Galloway's impostor *Marsh* test is: these unendingly Christian prayers are among those that Justice Ginsburg correctly declared unassailable under the real *Marsh* test.

Since Congress's chaplains' prayers pass constitutional muster, the Town's prayers present a much easier case, and they too pass muster.

B. Galloway's *Marsh* Test Imports Spurious Considerations Both by Backfilling Aspects of Other Establishment Clause Tests and by Introducing Red Herrings.

As noted above and as ably argued by the Town, Galloway's *Marsh* test is actually a back-doored Endorsement test. Neither a totality of the circumstances approach nor a reasonable observer test is appropriate. As the *Marsh* majority made clear, as the *Marsh* dissent lamented, and as Justice Ginsburg understood, legislative prayers are per se constitutional, absent the two exceptions the Town has acknowledged (and which are not present in the facts of the instant case—especially in light of the immediately preceding sub-section of this Brief).

However, Galloway exacerbated the just mentioned mistake by introducing additional red herrings. Specifically, Galloway emphasized that the Town is represented by a "'Christ-Centered' legal advocacy organization," and that several of the Town's *amici* were also represented by similar groups. (Br. in Opp. 6 & n.1.) Second, Galloway emphasized that children were sometimes present at the meetings, and this sometimes due to school-related activities.

Both these facts are red herrings.

First, the Town's *post hoc* selection of counsel cannot possibly impact the constitutionality *vel non* of the Town's prayers. Yet Galloway seems to be seeking to—if not legally, at least psychologically—influence this Court's analysis with this fact. Apparently, under Galloway's view, a plaintiff who believes that strict separation is required by the constitution may be represented by a like-minded organization without any significance, but a governmental defendant that believes the constitution does not require strict separation may not be represented by a like-minded organization without risking some new or greater totality-of-the-circumstances constitutional violation.

Second, while the presence of children is constitutionally significant in other Establishment Clause contexts, it is not constitutionally significant in the legislative prayer context. Perhaps Galloway believes the presence of children is a fact unique to *local* legislative bodies. But, of course, it is not. As just one example, the both the United States House of Representatives and Senate frequently have children present during their prayers, and in fact, Congress is "delighted" to have them present at such times even—or perhaps especially—when present for school-related purposes:

> We are delighted that you [as a teacher] are planning a school group visit to the United States Capitol. We look forward to greeting you and your students upon your arrival. . . . . The gallery of the Senate Chamber is open to visitors when the Senate is in session [including, of course, during prayer times]. . . . The House of Representatives Chamber

> gallery is open to visitors when the House is in session [including, of course, during prayer times] . . . .

U.S. Capitol Visitors Center, "Planning a Field Trip to the Capitol," http://www.visitthecapitol.gov/schools-teachers/planning-field-trip-the-capitol (last visited Aug. 2, 2013).

Having shown that Galloway's *Marsh* test is the impostor, this Brief will now show that a major reason that the Town's *Marsh* test is the real one is because it comports with the Framers' intentions.

III. THE TOWN'S *MARSH* TEST IS CONSISTENT WITH THE FRAMERS' DESIRE TO PROTECT THE RIGHTS OF BOTH THE MAJORITY AND THE MINORITY BECAUSE THE TOWN'S PRACTICE *AT MOST* ENCOURAGES RELIGION BUT FALLS FAR SHORT OF ESTABLISHING RELIGION.

A. A Proper Understanding of the Establishment Clause Protects the Rights of the Majority and the Minority.

As noted above, in typical prayer cases, including this one, the rights of the majority and the rights of the minority are pitted against each other. *See*, *Snyder v. Murray City Corp*, 159 F.3d 1227, 1231 (10th Cir. 1998) (*en banc*). The Framers were well aware of the nature of such disputes, and a brief look at some history will be instructive in understanding why the Town's *Marsh* test is the real one and why the Town's prayer practice is wholly permissible under that test and under the

Constitution.

The balancing of the rights of the majority and the minority must never be a matter of "either/or"; it must always be a matter of "both/and." Thus, *The Federalist Papers* reflect the concern about the tyranny of the majority over the minority. For example, in *Federalist 51* we read, "[i]f a majority be united by common interest, the rights of the minority will be insecure." *The Federalist* No. 51, at 161 (James Madison) (Roy P. Fairfield ed., 2d ed. 1981). However, *The Federalist* was equally, if not more, concerned about the tyranny of the minority over the majority. For example, in *Federalist 22*, we read that the "fundamental maxim of republican government . . . requires that the sense of the majority should prevail." *The Federalist* No. 22, at 52 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981). The only exception would be if that sense violated the constitutional protection put in place to protect the minority.

Importantly, as discussed above, the Town's practice does not violate the Establishment Clause under the principles articulated in the real *Marsh* test. Nonetheless, this reality becomes even more clear by examining *how* the Framers protected majorities and minorities in the area of religion. The Framers did so by distinguishing four concepts: the acknowledgement of religion, the accommodation of religion, the encouragement of religion, and the establishment of religion. In deciding how to balance the rights of, and protect against the tyranny of, majorities and minorities, the Framers determined that acknowledge, accommodation, and encouragement of religion would be permitted and that only establishment would be forbidden. And as the following sections will demonstrate, it is clear

that the Town's prayers do not establish religion.

B. True Establishment of Religion is Prohibited.

It is important to remember what the original concept of establishment was all about. The Framers were actually aware of three different ways in which religion could be established, as explained by Justice Joseph Story:

> One, where a government affords aid to a particular religion, leaving all persons free to adopt any other; another, where it creates an ecclesiastical establishment for the propagation of the doctrines of a particular sect of that religion, leaving a like freedom to all others; and a third, where it creates such an establishment, and excludes all persons, not belonging to it, either wholly, or in part, from any participation in the public honours, trusts, emoluments, privileges, and immunities of the state.

Joseph Story, *Commentaries on the Constitution of the United States* § 1866 (Arthur E. Sutherland ed. 1970) (1833).

With such a definition in mind, it is easier to distinguish acknowledgement, accommodation, and encouragement on the one hand from establishment on the other hand. Although some of the historical examples of acknowledgement, accommodation, and encouragement do not directly parallel the facts of the present case, it is important to obtain a fairly full-orbed view of these concepts. This Brief will look at each in turn.

C. Acknowledgment of Religion is Permitted.

One of the most historically accurate explications of the meaning of the Establishment Clause is contained in then-Justice Rehnquist's dissent in *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting). There one reads the following:

> On the day after the House of Representatives voted to adopt the form of the First Amendment Religion Clauses which was ultimately proposed and ratified, Representative Elias Boudinot proposed a resolution asking President George Washington to issue a Thanksgiving Day Proclamation. Boudinot said he "could not think of letting the session pass over without offering an opportunity to all the citizens the United States of joining with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them."

Id. at 100-01 (Rehnquist, J., dissenting) (*citing and quoting* 1 Annals of Cong. 914 (1789)). Justice Rehnquist then documented some of the debate over the resolution, including objections on what today would be called establishment grounds. *Id.* at 101 (Rehnquist, J., dissenting). This shows that the First Congress did not simply engage in inconsistent action. Rather, they heard the minority view and rejected it.

Justice Rehnquist then described some of the final language of the Joint Resolution and quoted the

Thanksgiving proclamation ultimately issued by President Washington:

> Within two weeks of this action by the House, George Washington responded to the Joint Resolution which by now had been changed to include the language that the President "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness." The Presidential Proclamation was couched in these words:
>
> > Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquillity, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish

> constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us.
>
> And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed; to protect and guide all sovereigns and nations (especially such as have shown kindness to us), and to bless them with good governments, peace, and concord; to promote the knowledge and practice of true religion and virtue, and the increase of science among them and us; and, generally, to grant unto all mankind such a degree of temporal prosperity as He alone knows to be best.

Id. at 101-03 (Rehnquist, J., dissenting) (*citing and quoting* 1 J. Richardson, Messages and Papers of the

Presidents, 1789-1897, at 64 (1897)). The opening words of this same Thanksgiving Proclamation are these: "Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor . . . ." http://avalon.law.yale.edu/18th_century/gwproc01.asp (last visited Aug. 2, 2011).

Justice Rehnquist also noted the views of the eminent constitutional authority, Thomas Cooley:

> But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving his boundless favors, or bowing in contrition when visited with the penalties of his broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State

> government. Undoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or sect; but the power to do any of these things does not become unconstitutional simply because of its susceptibility to abuse . . . .

Thomas Cooley, *Treatise on the Constitutional Which Rest Upon the Legislative Power of the States of American Union*, 470-71 (1868) (quoted in *Wallace*, 472 U.S. at 105-06 (Rehnquist, J., dissenting)). Here Cooley was addressing the acknowledgment of God Himself, which is in fact, what Washington had done. It naturally follows that if government can acknowledge God, it can acknowledge religion; and Justice Rehnquist went on to quote Cooley's discussion of the "public recognition of religious worship." *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting) (citation omitted).[2]

In sum, acknowledgement is not a hard concept. It meant then exactly what it means now—to recognize. Government can recognize the reality of God and the importance of religion.

Prayer is perhaps the most obvious way in which a legislative body can acknowledge God and the members' religious beliefs.

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[2] This same quotation from Cooley also supports the concept of encouragement that this Brief will address below.

D. Accommodation of Religion is Permitted.

Government can go a step beyond acknowledging religion. It may accommodate various sects' religious views and acts. This approach was discussed by George Washington. "[I]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit." Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), *in George Washington on Religious Liberty and Mutual Understanding* 11 (E. Humphrey ed. 1932).

Importantly, this very passage was quoted by Justice O'Connor in her dissent in *City of Boerne v. Flores*. 521 U.S. 507, 562 (1997) (O'Connor, J., dissenting). In *Flores*, Justices O'Connor and Scalia debated whether Washington's sentiment and similar sentiments expressed during the colonial and early national period demonstrate that accommodation is constitutionally *required*. *Cf. id.* at 560-64 (O'Connor, J., dissenting) with *id.* at 541-44 (Scalia, J., concurring in part). Significantly, that debate is not implicated by the instant case. Rather, Justices O'Connor and Scalia's point of agreement is implicated here: many historic practices that continue to the present day constitute an accommodation of religion and such accommodation is constitutionally *permitted*. These practices include exemptions from military service and exemptions from oath taking, among others. *Id.* at 560-64 (O'Connor, J., dissenting); *id.* at 541-44 (Scalia, J.,

concurring in part).

But these accommodations can also involve pro-actively providing services and opportunities. Classic examples include military, prison, and legislative chaplains.

Like acknowledgement, accommodation is not a hard concept. It simply means that the government changes what it otherwise might do, whether by granting exceptions or providing services that take into account the religious needs of the people. Prayer at the meeting of deliberative bodies accommodates the religious needs of the members of such bodies. And it is the business of those members to determine what type of prayer meets their needs.

E. Encouragement of Religion is Permitted.

Governments can go yet further and encourage religion. Probably the most famous articulation of the encouragement principle is that found in the Northwest Ordinance, which states: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." http://www.earlyamerica.com/earlyamerica/milestones/ordinance/text.html (last visited Aug. 2, 2013).

However, the Founders did not just talk about encouraging religion; they actually did so. Here one can return to then-Justice Rehnquist's *Wallace v. Jaffree* dissent. There he noted that

> [a]s the United States moved from the 18th into the 19th century, Congress appropriated time and again public moneys in support of

> sectarian Indian education carried on by religious organizations. Typical of these was Jefferson's treaty with the Kaskaskia Indians, which provided annual cash support for the Tribe's Roman Catholic priest and church. It was not until 1897, when aid to sectarian education for Indians had reached $500,000 annually, that Congress decided thereafter to cease appropriating money for education in sectarian schools. This history shows the fallacy of the notion found in *Everson* that "no tax in any amount" may be levied for religious activities in any form.

Wallace, 472 U.S. at 103-04 (Rehnquist, J., dissenting) (footnote and citations omitted).

Justice Rehnquist went on to note even more detail about Jefferson's treaty:

> The treaty stated in part: "*And whereas*, the greater part of said Tribe have been baptized and received into the Catholic church, to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion . . . [a]nd . . . three hundred dollars, to assist the said Tribe in the erection of a church." From 1789 to 1823 the United States Congress had provided a trust endowment of up to 12,000 acres of land "for the Society of the United Brethren, for propagating the Gospel among the Heathen." The Act creating this endowment was renewed periodically and the renewals were signed into law by Washington, Adams, and Jefferson. Congressional grants for the aid of religion

> were not limited to Indians. In 1787 Congress provided land to the Ohio Company, including acreage for the support of religion. This grant was reauthorized in 1792. In 1833 Congress authorized the State of Ohio to sell the land set aside for religion and use the proceeds "for the support of religion . . . and for no other use or purpose whatsoever . . . ."

Id. at 104 n.5 (Rehnquist, J., dissenting).

Thus, encouragement goes beyond acknowledging God and religion. It goes beyond accommodating a religious sect's or individual's request for an accommodation. It even goes beyond pro-actively extending accommodations without being asked. It involves looking for ways to encourage the population to engage in religious pursuits. It certainly includes proclamations that encourage such actions. Sometimes the vehicle of encouragement will be one sect; sometimes a different one. The Framers truly believed that "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind . . . . ." Therefore, government could encourage religion.

To the extent that prayers at deliberative bodies may suggest to members of the body or to those otherwise in attendance to they should attend to religious duties—even should some members or attendees be disinclined to do so or be offended by the suggestion—government may nonetheless engage in such encouragement.

F. The Historic Concepts Persist in Modern Establishment Clause Jurisprudence.

Although current Establishment Clause jurisprudence has retreated far from some of these last examples, the history lesson sets the stage for an important reality: even though watered down, the concepts of acknowledgement, accommodation, and even encouragement have not fallen out of this Court's Establishment Clause jurisprudence.

For example, the acknowledgement of both God and the role of religion in society continues to be addressed. As noted by the Town, in *Marsh*, the Court upheld Nebraska's legislative chaplaincy program. In so doing the Court noted that "[t]o invoke Divine guidance on a public body entrusted with making the laws is not . . . an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country." *Id.* at 792. This principle was reiterated again in *Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (plurality), when Chief Justice Rehnquist quoted from the Court's earlier Establishment Clause case, *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984): "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."

Similarly, the concept of accommodation is alive and well and was discussed by a majority of this Court as recently as 2006 in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423, 435-36 (2006). And well-known articulations of accommodation occur in *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) ("When the

state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."); and in *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.").

And, of course, the accommodation quotation from *Zorach* also addresses encouragement: "When the state encourages religious instruction . . . it follows the best of our traditions." These words first appeared in *Zorach*, 343 U.S. at 313-14 (garnering the votes of Vinson, C.J., & Reed, Douglas, Burton, Clark, & Minton, JJ.). Since then the words have been quoted in whole or in part in eleven other Supreme Court opinions.[3]

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[3] *Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (Rehnquist, C.J., writing for the plurality, joined by Scalia, Kennedy & Thomas, JJ.); *Board of Educ. v. Grumet*, 512 U.S. 687, 744 (1994) (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400-01 (1993) (Scalia & Thomas, JJ,, concurring); *Cnty. of Alleghenyy v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, White & Scalia, JJ., & Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 554 (1986) (Burger, C.J., & White & Rehnquist, JJ., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring); *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Burger, C.J., concurring in the judgment in part and dissenting in part); *Meek v. Pittenger*, 421 U.S. 349, 386

G. The Town's Practice Falls Far Short of Establishing a Religion.

The point for the present case is obvious, but important: Wherever on the continuum from acknowledgement to accommodation to encouragement this Court might place the Town's practice of opening its meetings with prayer, that plan does not constitute establishment under the Framers' principles.

While more nuanced tests may be required for certain types of Establishment Clause cases, Galloway's impostor *Marsh* test simply muddies clear water. On the other hand, the Town is correct: because it had no improper motive and because its prayers do not proselytize or disparage, those prayers are constitutional.

IV. *MARSH'S* HISTORICALLY-BASED ANALYSIS APPLIES TO THE PRAYERS OF LOCAL DELIBERATIVE BODIES.

The arguments made in this Brief so far

(1975) (Rehnquist & White, JJ., concurring in the judgment in part and dissenting in part); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 813 (1973) (White, J., dissenting, joined in part by Burger, C.J., & Rehnquist, J.) (opinion applying also to two consolidated cases); *Lemon v. Kurtzman*, 403 U.S. 602, 661 (1971) (White, J., concurring in two consolidated cases and dissenting in two consolidated cases); and *Walz v. Tax Com. of New York*, 397 U.S. 664, 671 (1970) (Burger, C.J., & Black, Stewart, White, & Marshall, JJ.). All but Justice O'Connor's are positive invocations of this proposition. Justice O'Connor noted that the proposition was inapposite as used by appellants.

should be sufficient to demonstrate that the Town's prayers pass constitutional muster. However, courts have sometimes refused to apply *Marsh* to various categories of prayer because they believed—rightly or wrongly—that the prayers at issue did not meet *Marsh's* unique history, long tradition, or widespread practice "requirements." *See, e.g., Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003) ("Put simply, the supper prayer does not share *Marsh*'s 'unique history.' In fact, public universities and military colleges, such as VMI, did not exist when the Bill of Rights was adopted.")

Thus, it is worth pointing out that although data about prayer at local deliberative bodies is harder to come by than information about the national and state legislatures, it is not impossible to find. Your *Amicus* offers a few examples here.

In one dispute arising out of a challenge to a city's prayer policy, thirty-four cities joined together to file an *amicus* brief, seeking to be a voice for some larger number of "dozens" of cities in California that opened their meetings with prayer. Brief *Amicus Curiae* for Thirty-four California Cities at 1, *Rubin v. City of Burbank*, 101 Cal. App. 4th 1194 (Cal. App. 2002) (No. B148288), available at 2001 WL 34131868. Thus, if California itself had more than thirty-four towns including invocations at their meetings in 2002, it is no stretch of reason to think that thousands of cities, towns, and counties throughout the rest of the nation had similar practices.

Statements from several courts serve to further illustrate the practices of the local

governments regarding prayers. For example, Salt Lake City's invocation practice is a venerable one. There the city government's practice of opening meetings with prayer dates back to its inception as a city in 1851. *Society of Separationists v. Whitehead*, 870 P.2d 916, 918, n.1 (Utah 1993).

In upholding a New Jersey town's pre-meeting invocation, the New Jersey Supreme Court explained that "*in the past* meetings were customarily opened with an invocation by local clergy *until June 1976*, when council members individually began giving the invocations. *Marsa v. Wernik*, 430 A.2d 888, 891 (N.J. 1981) (emphasis added). The District Court in Minnesota noted the "[l]ong-time custom and practice" in the United States of opening town meetings with prayer. *Bogen v. Doty*, 456 F. Supp. 983, 984 (D. Minn. 1978).

Other courts simply describe local prayers with generic expressions such as "for many years," *Rubin v. City of Lancaster*, 802 F. Supp. 2d 1107, 1108 (C.D. Cal. 2011), "longstanding practice" *Bats v. Cobb County*, 410 F. Supp. 2d 1324, 1325 (N.D. Ga. 2006) or "long tradition," *Pelphrey v. Cobb County*, 547 F.3d 1263, 1267 (11th Cir. 2008).

Implicitly, whatever the length of these practices, the courts found them sufficiently long that they did not question whether *Marsh* applied. Similarly, here, there should be no question that the *Marsh* test—that is, the real *Marsh* test—controls. And as already demonstrated, the Town's prayers pass muster under that test.

CONCLUSION

For the foregoing reasons and for other reasons stated in the Town's Brief, this Court should

reverse the judgment of the Second Circuit.

Respectfully submitted,
this 2nd day of August, 2013,

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